THE

LAW

OF

DAMAGES.

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to is very uſeful to all Perſons engaged in the Profeſſion of the Law, and particularly to thoſe who are concerned in the Management of Cauſes. The Deſign of this Book is to aſſiſt in the acquiring ſuch a Knowledge.

That Recourſe may be readily had to any Part of the Subject, every Part thereof, which is in any Degree extenſive, has a diſtinct Chapter aſſigned to it. A very few Things, not conſiderable enough for diſtinct Chapters, are compriſed in a general one.

The

The Chapters, as far as the Nature of the Subject would admit thereof, are ſo ranged, that the Matter of the preceding ones is introductory to what is contained in the ſucceeding ones; and that the Matter of the ſucceeding ones does illuſtrate or confirm what is contained in the preceding ones.

In the Courſe of the Work ſuch Remarks and Obſervations are inſerted, as were in the Author's Judgment neceſſary or proper to be made.

DAMAGES.

CHAP. I.

In what Actions Damages are in the general recoverable.

DAMAGES are a pecuniary Recompence for an Injury.

It is in the general true, that Damages are not recoverable by a private Perſon for an Injury to the Publick: For as every private Perſon is in ſome

Degree injured by an Injury to the Publick, if any private Perſon could recover Damages for the Injury every one might, the Conſequence of which might be an Infinity of Actions.

For the ſake of preventing ſo great an Inconveniency, it has been for many Ages a ſettled Point of Law, that only one Action ſhall be carried on for one Crime, by which Name every Injury to the Publick is called, and that this ſhall be brought in the Name of the King, who in Conſequence of his being Supreme Magiſtrate, is the Guardian and Protector of the Publick Peace and Safety.

Sometimes in a criminal Action, by which Name every Action for a Crime is called, it is a Part or the Whole of the Puniſhment inflicted upon the Criminal, that he ſhall pay a Sum

a Sum of Money to the King: This Sum of Money, which ought perhaps to be conſidered as a Recompence for the Injury to the Publick, is in order to diſtinguiſh it from a pecuniary Recompence to a private Perſon, called a Fine.

Every Action which is brought for an Injury to a private Perſon is called a Civil one.

Civil Actions are divided into real, mixed and Perſonal ones.

It is ſaid, that the Demandant in a real Action cannot recover Damages at the Common Law; becauſe no Damages are alledged by him either in his Writ or Count; it being a Maxim of the Common Law, that *Judex non reddit plus quam ipſe petens requirit.* 2 Inſt 286 10 Rep. 116.

The reaſon aſſigned, why Damages cannot be recovered at the Common Law in a real Action, does not hold univerſally. No Damages are alledged either in the Writ or Count in an Aſſize of Novel Diſſeiſin; yet it ſeems to be certain, that Damages are recoverable at the Common Law in an Aſſize of Novel Diſſeiſin; for in the Statute of *Glouceſter*, *c.* 7. by which Damages are given in an Aſſize of Novel Diſſeiſin againſt the Alienee of the Diſſeiſor, it is recited, "that Da-"mages were theretofore awarded in "an Aſſize of Novel Diſſeiſin againſt "the Diſſeiſor."

It is not a little ſurpriſing, that in the Books cited, and in divers others, there ſhould be an Attempt to Aſſign a Reaſon, why Damages cannot be recovered at the Common Law in a real

real Action: Whereas if the Nature of the Action be attended to, the Impoſſibility of recovering Damages therein will be evident.

It is of the Eſſence of a real Action, that only a real Thing can be recovered therein; for wherever Damages, which are a pecuniary Recompence for an Injury, and conſequently a perſonal Thing, are recoverable in the ſame Action wherein a real Thing may be recovered, the Action is diſtinguiſhed by the Name of a mixed Action.

It is therefore not only true, that no Damages can be recovered at the Common Law in a real Action: But it is likewiſe true, that no Damages are recoverable under any Statute in a real Action; for when Damages are given by a Statute in a real Action, the Action does imme-

diately ceaſe to be a real One, and becomes from that Time a mixed One.

2 Inſt. 286. Damages are recoverable in every mixed Action; it being of the Eſſence of a mixed Action, that Damages as well as a real Thing may be recovered therein.

Damages are recoverable in every perſonal Action which lies at the Common Law.

2 Inſt. 280. It may be fairly inferred from what has been ſaid concerning a criminal Action, that Damages are recoverable for every injury to a private Perſon. If this be ſo, it follows neceſſarily, that Damages are recoverable in every perſonal Action which lies at the Common Law: Becauſe a perſonal Action does not lie at the Common Law on the Account of a Damage

Damage which was not occaſioned by an Injury, ſuch a Damage being what the Law calls *Damnum ſine injuria.*

CHAP. II.

Of Damages in an Aſſize of Novel Diſſeiſin.

IT is not neceſſary in this Chapter, or in any one of the Subſequent ones which treats of Damages in a particular Action, to enumerate the Caſes in which Damages are recoverable in the particular Action. The doing of this would be very proper in a general Treatiſe upon the particular Action:

Action: But it would be foreign to the preſent deſign, which is only to point out the Singularities, relative to Damages in the particular Action.

It ſeems to be certain, that Damages are recoverable at the Common Law in an Aſſize of novel Diſſeiſin againſt the Diſſeiſſor; for in the Statute of *Glouceſter*, *c.* 1. which is the firſt Statute whereby Damages are given in an Aſſize of novel Diſſeiſin, it is recited, "That Damages "were theretofore awarded therein "againſt the Diſſeiſor."

By the Statute of *Glouceſter*, *c.* 1. it is enacted, "That if the Diſſeiſor "do alien the Land, and have not "whereof Damages may be levied, "they to whoſe Hands the Land "ſhall come ſhall be charged with "the

" the Damages, ſo that every one
" ſhall anſwer for his Time."

The Conſtruction has been, that the Words of this Statute *alien the Land* do as well extend to a Tenant who came into Poſſeſſion after the Diſſeiſin by wrong, as to one who came into Poſſeſſion by the Act of the Diſſeiſor or of his Alienee. 2 Inſt. 284.

This Conſtruction appears to be a reaſonable one; for it is not to be conceived, that the Makers of the Statute of *Glouceſter*, who have given Damages againſt a Tenant who came into Poſſeſſion by the Act of the Diſſeiſor or his Alienee, did not intend to give Damages likewiſe againſt a Tenant who came into the Poſſeſſion after the Diſſeiſin by Wrong. a Ibid.

If

2 Inſt. 285. 15 H. 7. 5. B.

If the Leſſee for Years be diſſeiſed, and the Reverſioner enter upon the Diſſeiſor, and the Diſſeiſor re-enter upon him, the Reverſioner may during the Term recover the Land in an Aſſize of Novel Diſſeiſin: But he cannot recover any Damages; becauſe as the Eſtate of the Leſſee for Years is reduced by the Recovery of the Reverſioner, the Profits of the Land do during the Term belong to him, and it is not reaſonable, that the Diſſeiſor ſhould be anſwerable for the ſame Profits to two Perſons.

Bro. Dam. Pl. 180.

If the Demandant in an Aſſize of Novel Diſſeiſin do pending the Aſſize enter into Part of the Land, he cannot recover Damages as to the other Part; for Damages cannot be recovered as to Part in this Aſſize.

If

If double or treble Damages are given by a Statute in an Aſſize of Novel Diſſeiſin againſt the Diſſeiſor, every Tenant who comes into Poſſeſſion after the Diſſeiſin, is liable to the Double or Treble Damages, for ſo long Time as he has been in Poſſeſſion. 2 Inſt. 285.

As Damages are only given by the Statute of *Glouceſter*, *c.* 1. in an Aſſize of Novel Diſſeiſin, againſt the Tenant who came into Poſſeſſion after the Diſſeiſin, in Caſe the Diſſeiſor have not whereof Damages may be levied, it is neceſſary, in order to obtain Judgment for Damages againſt ſuch Tenant, to have it found by the Jury, that the Diſſeiſor is unable to anſwer the whole Damages. 2 Inſt. 284, 285.

In entering up Judgment in an Aſſize of Novel Diſſeiſin, it is proper 2 Inſt. 284.

to

to enter it up againſt the Diſſeiſor, as well as againſt the Tenant who came into Poſſeſſion after the Diſſeiſin; for if this be not done, Execution cannot be taken out againſt the Diſſeiſor, for that Part of the Damages which he is able to pay.

CHAP.

CHAP. III.

Of Damages in an Action of Entry *ſur Novel Diſſeiſin.*

NO Damages are recoverable at the Common Law in an Action of Entry *ſur Novel Diſſeiſin.*

By the Statute of *Glouceſter*, *c.* 1. it is enacted, "That the Diſ-"ſeiſee ſhall recover Damages in a "Writ of Entry *ſur Novel Diſſeiſin*, "againſt him who is found Tenant "after the Diſſeiſor."

The Heir of the Diſſeiſee cannot recover Damages in an Action *ſur Novel Diſſeiſin* under this Clauſe; becauſe only the *Diſſeiſin* himſelf is therein mentioned.

But the Heir of the Diſſeiſee may recover Damages in this Action, under a ſubſequent Clauſe in the ſame Chapter of the Statute of *Glouceſter*; it being thereby enacted, "That "every Perſon ſhall from henceforth "be compelled to render Damages, "where Land is recovered againſt "him upon his own Intruſion or his "own Act."

2 Inſt. 286. If the Diſſeiſor have aliened the Land, the Heir of the Diſſeiſee cannot recover Damages under this clauſe in an Action of Entry for *Novel Diſſeiſin* againſt the Alienee: Becauſe the Alienee did not come into Poſſeſſion either by his own Intruſion or his own Act.

2 Inſt. 287 Notwithſtanding the Words of the Statute of *Glouceſter* are *him who is found Tenant after the Diſſeiſor*, it has been holden, that the Tenant, who

who came into Poſſeſſion of the Land after the Diſſeiſor by Act of Law, is not anſwerable for Damages in an Action of Entry *ſur Novel Diſſeiſin*; it being a Maxim of Law that *Actus legis nemini eſt Damnoſus.*

But if the Tenant, who came into Poſſeſſion of the Land after the Diſſeiſor by Act of Law, has taken the Profits, he is anſwerable for Damages in an Action of Entry *ſur Novel Diſſeiſin*; becauſe the taking of the Profits, which did of right belong to the Diſſeiſee, was a tortious Act. 2 Inſt. 286.

If an Action of Entry *ſur Novel Diſſeiſin* be brought by the Diſſeiſee, againſt a Tenant who is liable to Damages, Damages may be recovered for the whole Time from the Time of the Diſſeiſin; it not being enacted by the Clauſe of the Statute of *Glouceſter* which gives Damages in Ibid.

this Action, as it is in that which gives Damages in an Aſſize of *Novel Diſſeiſin*, "That every one ſhall an-"ſwer for his Time."

2Inſt.286. But if this Action be brought by the Heir of the Diſſeiſee, againſt a Tenant after the Diſſeiſor who is liable to Damages, Damages can only be recovered from the Time of the Death of the Diſſeiſee.

2Inſt.187. If an Action of Entry *ſur Novel Diſſeiſin* be brought againſt two Joint Tenants, and one of them diſclaim, and the other plead in Bar of the Action, and the Iſſue joined upon the Plea be found againſt him, the Demandant ſhall recover Damages againſt him for the whole Land; becauſe he has by pleading in Bar of the Action taken upon himſelf the Tenancy as to the whole.

If

If the Diſſeiſor of Land infeoff *A.* who infeoffeth *B.* and the Diſſeiſee bring an Action of Entry *ſur Novel Diſſeiſin* againſt *B.* who voucheth *A.* who pleadeth, and the Iſſue joined upon the Plea be found againſt him, the Demandant ſhall recover Damages againſt *A.* becauſe he is found to be Tenant of the Land. 2 Inſt. 287.

If an Action of Entry *ſur Novel Diſſeiſin* a Writ of Enquiry be awarded, Damages can only be aſſeſſed to the Time of awarding it, and if there be a Verdict Damages can only be aſſeſſed to the Time of finding it. 10 Rep. 117, Pilfold's caſe Bro. Dam. pl. 14.

CHAP. IV.

Of Damages in an Aſſize of *Mort D'anceſtor.*

NO Damages are recoverable at the Common Law in an Aſſize of *Mort D'Anceſtor.*

By the Statute *Marlbrige*, *c.* 16. it is enacted, " That if the Chief " Lord do put an Heir out of Poſ- " ſeſſion maliciouſly, whereby he " be driven to purchaſe a Writ of " *Mort D'anceſtor*, then he ſhall re- " cover Damages as in an Aſſize of " *Novel Diſſeiſin.*"

By the Statute of *Glouceſter*, *c.* 1. after reciting, that before this Time Damages were not awarded in a Plea of *Mort D'anceſtor*, except the Tenement was recovered againſt the Chief

Chief Lord, it is enacted, " That " from henceforth Damages ſhall be " awarded in every Caſe where a " Man recovereth in an Aſſize of " *Mort D'anceſtor*, in the ſame Man- " ner as is before ſaid in an Aſſize " of Novel Diſſeiſin."

It is ſaid, that as an Aſſize of *Mort D'anceſtor* can only be brought againſt the Tenant, the mean Occupiers after an Abatement are not liable to Damages in an Aſſize of *Mort D'anceſtor*, notwithſtanding the Words of the Statute of *Glouceſter* are, that Damages ſhall be awarded in an Aſſize of *Mort D'anceſtor* in the ſame Manner as in the Aſſize of *Novel* Diſſeiſin: But that the Tenant is liable for all the Damages from the Time of the Abatement. 2 Inſt. 287.

If a Father having Iſſue two Sons die ſeiſed of Land in fee, and after a Stranger has abated the Elder Son die, Ibid.

die, the ſecond Son may bring an Aſſize of *Mort D'anceſtor*, and may recover Damages therein, not only from the Death of the Brother, but alſo from that of the Father; becauſe he does not make Title as Heir to the Brother, but as Heir to the Father.

2 Inſt. 288. If a Father having Iſſue two Daughters die ſeiſed in fee of Land, and after a Stranger has abated one of the Siſters die leaving Iſſue a Daughter, the Daughter may join with her Aunt in the Aſſize of *Mort D'anceſtor*, becauſe they may jointly recover the Land. They may likewiſe jointly recover Damages from the Time of the Siſter's Death: But Damages for the Time between the Death of the Father and the Death of the Siſter can only be recovered by the Aunt.

CHAP.

CHAP. V.

Of Damages in an Action of Coſinage, or in one of Aiel or Beſaiel.

NO Damages are recoverable at the Common Law, in an Action of Coſinage, or in one of Aiel or Beſaiel.

By the Statute of *Glouceſter*, *c.* 1. it is enacted, "That Damages "ſhall be recovered in Writs of "Coſinage, Aiel and Beſaiel."

The Demandant in either of theſe Actions can only recover Damages from the Death of his immediate Anceſtor.

If

2 Inſt. 288. Bro. Dam. pl. 37. If there be Grandfather, Son and Grandſon, and the Grandfather die ſeiſed in Fee of Land, and after a Stranger has abated the Son die, the Grandſon, if he bring an Action of *Aiel*, muſt make Title as Heir of the Son, who was Heir of the Grandfather: But he can only recover Damages from the Death of the Son, who was his immediate Anceſtor.

2 Inſt. 288. If there be Father and Son, and the Father die ſeiſed in Fee of Land, and after a Stranger has abated the Son die, leaving a Wife privement encient with a Son, who is afterwards born, the Grandſon, if he brings an Action of Aiel, muſt make Title as Heir of the Son, who was Heir of the Father. But he can only recover Damages from the Death of the Son, who was his immediate Anceſtor.

CHAP.

CHAP. VI.

Of Damages in an Action of Dower *unde nihil habet.*

NO Damages are recoverable, either at the Common Law, or under any Statute in an Action of Right of Dower. 1 Inſt. 32.

Damages are recoverable in an action of Dower *unde nihil habet*, it being by the Statute of *Merton*, *c.* 1. by which this Action is given, enacted, "That if Widows after the "Death of their Huſbands are de-"forced of their Dowers, and cannot "have their Dowers without plea, "they that be convicted of ſuch De-"forcement ſhall yield Damages to "the ſame Widows, that is to ſay, "the Value of the whole Dower to "them

" them belonging, from the Time " of the Death of their Huſbands " unto the Day that the ſaid Wi- " dows by Judgment of our Court " have recovered Seiſin of their " Dowers."

1 Inſt. 32, 34, 35, 37. Damages are not recoverable in an Action of Dower *unde nihil habet*, brought to recover Dower *ad Oſtium Eccleſiæ*, or Dower *ex Aſſenſu Patris*; becauſe the Widow might in either of theſe caſes, as the Land which ſhe is to have for Dower is aſcertained, have entered upon it; and conſequently might have had her Dower without Plea.

1 Inſt. 33. If a Widow have Dower aſſigned in conſequence of a Decree of a Court of Equity, ſhe is not entitled to Damages; becauſe Damages are only given by the Statute of *Merton*, *where a Widow cannot have her Dower without Plea.*

It

It is neceſſary, to the intitling of herſelf to Damages, for a Widow to make a Demand of Dower previouſly to the bringing of an Action of Dower *unde nihil habet*; otherwiſe as the Statute of *Merton* only gives Damages *where a Widow cannot have her Dower without Plea*, the Heir may plead in Bar of Damages, that he has been always ready to aſſign Dower. 1 Inſt. 34.

But if the Perſon, againſt whom an Action of Dower, *unde nihil habet* is brought, be ſummoned and do not come at the Day, he cannot although he do afterwards come, plead that he has been always ready to aſſign Dower, it being inconſiſtent with his not coming at the Day, to ſay that he has been always ready to aſſign Dower. Bro. Dam. Pl. 186. 1 Rol. Ab. 574.

If the Plea, that he has been always ready to aſſign Dower, be plead- 1 Inſt. 34

ed by the Perſon againſt whom an Action of Dower *unde nihil habet* is brought in proper Time, the Widow may reply a Demand, in which Caſe, if an Iſſue be joined upon the Replication, and it be found for her, ſhe will be intitled to Damages.

2 Barn. 191. Penrice v. Penrice.

Upon the Execution of a Writ of Enquiry in an Action of Dower *unde nihil habet*, the Jury aſſeſſed Damages to the Amount of the third Part of the Value of the Land, from the Death of the Huſband to the Day of the Inquiſition, without making any Deduction for Land-Tax, Repairs or Chief Rents. The Inquiſition was ſet aſide; the Court being of Opinion, that as there are in a Writ of Dower *unde nihil habet* the Words *ultra repriſas*, a Deduction ought to have been made for Land-Tax, Repairs and Chief Rents; and that the Jury ought only to have aſſeſſed

aſſeſſed Damages to the Day of awarding the Writ of Enquiry.

The Opinion of the Court of *Common Pleas* as to the latter Point does not ſeem to be well founded.

It is indeed in one Caſe laid down, that upon a Writ of Enquiry in a mixed Action, Damages ought only to be aſſeſſed to the Time of awarding the Writ. 10 Rep. 117. Pilfold's Caſe.

But however the general Rule may be, as to the Time to which Damages ought to be aſſeſſed upon a Writ of Enquiry in a mixed Action, it is certain that the Rule does not extend to a Writ of Enquiry in an Action of Dower *unde nihil habet:* It being by the Statute of *Merton* c. 1. expreſsly provided, "That a "Widow ſhall recover Damages in "this Action from the Time of the

" Death of her Huſband, unto the " Day that ſhe have by Judgment " of our Court recovered Seiſin of " her Dower."

1 Leon. 56. Walker and Nevil.

It has moreover been holden, that Damages may be aſſeſſed upon a Writ of Enquiry in an Action of Dower, *unde nihil habet* to the Time of the Inquiſition.

1 Lev. 38. Atway v. Roberts. 3 Lev. 275

If the Tenant in an Action of Dower *unde nihil habet* die before Damages are aſſeſſed, the Demandant cannot have a Writ of *ſcire facias* for the recovering of Damages, either againſt the Heir of the Tenant or againſt the Ter-tenant; for as Damages in this Action are a Recompence for an Injury in the Nature of a Treſpaſs, neither the Heir of the Tenant nor the Ter-tenant is liable to any Damages; becauſe the Right to recover Damages for a tortious Act does always

always ceaſe upon the Death of the Perſon who did the Act.

CHAP. VII.

Of Damages in an Action of Waſte.

AN Action of Waſte lies at the Common Law againſt a Tenant in Dower or a Guardian: Becauſe as both theſe Perſons did always come into poſſeſſion by Act of Law, it is reaſonable that the Law ſhould guard againſt their committing Waſte. 2 Inſt. 299, 305.

But an Action of Waſte does not lie at the Common Law againſt a Tenant for Life or a Tenant for 2 Inſt. 299.

Years: Becauſe as theſe Tenants did always come into poſſeſſion by Act of the Perſon in whom the Inheritance was, it was his own folly that he did not guard in the Deed by which their Eſtates were created againſt the Commiſſion of Waſte.

2 Inſt. 145, 299, 300, 305. And it ſeems to be the better opinion, that an Action of Waſte lies at the Common Law againſt a Tenant by the Curteſy.

By the Statute of *Marlbridge*, *c.* 23. it is enacted, "That Farmers "during their Terms ſhall not make "Waſte without ſpecial Licence; "which Thing if they do, and "thereof be convicted, they ſhall "yield full Damages."

2 Inſt. 145. Under the Word Farmers every Perſon, who holds under a Leaſe for Life or Lives, or a Leaſe for Years, is com-

comprehended, although no Rent be reſerved in the Leaſe.

Only ſingle Damages were recoverable before the Statute of *Glouceſter*, either in the Action of Waſte which lies at the Common Law; or in the Action of Waſte which is given by the Statute of *Marlbridge*. 2 Inſt. 146.

By this Statute of *Glouceſter*, *c.* 5. it is enacted, "That a Man ſhall "have a Writ of Waſte againſt him, "who holdeth by the Law of *Eng-* "*land*, or otherwiſe for Term of "Life, or for Term of Years, or a "Woman in Dower; and the Perſon "who ſhall be attainted of Waſte "ſhall loſe the Thing he hath "waſted, and ſhall moreover make "Recompence in thrice the Sum "which the Waſte ſhall be taxed at; "and whereas it is contained in the "Great Charter, that the Perſon who

"ſhall

" ſhall commit Waſte on the Land
" of his Ward ſhall loſe the Ward-
" ſhip, it is agreed that he ſhall pay
" to the Heir the Damages of the
" Waſte, if ſo be that the Value of
" the Wardſhip loſt do not before
" the Heir be of Age amount to the
" Value of the Damages."

2 Inſt. 304. If the Leſſee for Years have committed Waſte, and his Term expire by Flux of Time, or be determined by Act of God, inſomuch that the Leſſor cannot recover the Place waſted, he may, notwithſtanding the Words of the Statute are in the Conjunctive, " That the Perſon attainted
" of Waſte ſhall loſe the Thing
" waſted, and make Recompence in
" thrice the Sum which the Waſte
" ſhall be taxed at," recover treble Damages.

1 Inſt. 198. 2 Inſt. 305. If an Aunt join with her Niece in an Action of Waſte againſt a Tenant for

for Years, for Waſte committed during the Life of a Siſter to the Aunt, who was a Copartner with the Aunt, and to whom the Niece is Heir, they may jointly recover the Place waſted: But Damages can only be recovered by the Aunt.

If Tenant for Life and the Perſon in the Reverſion, who have joined in a Leaſe for Life, do afterwards join in an Action of Waſte againſt the Leſſee for Life, the Reverſioner and Tenant for Life may jointly recover Damages; but only the Tenant for Life can recover the Place waſted. 1 Inſt. 42.

If the Perſon in the Reverſion bring an Action of Waſte, and obtain Judgment to recover the Place waſted and Damages, but die before Execution is executed, the Land ſhall deſcend upon his Heir, but the Damages Bro. Dam. Pl. 177.

mages ſhall go to his perſonal repreſentative, an Intereſt therein being veſted by Judgment.

2 Inſt. 304, 329. Damages are not recoverable in an Action of Waſte, for Waſte committed pending the Action.

Ibid. It is in the general true, that Damages may be recovered in an Action of Eſtrepement brought pending an Action of Waſte, for Waſte committed pending the Action of Waſte.

2 Inſt. 328. But Damages are not recoverable in an Action of Eſtrepement brought pending an Action of Waſte, for Waſte committed by a Stranger without the Privilege of the Tenant pending the Action of Waſte.

CHAP.

CHAP. VIII.

Of Damages in an Aſſize of *Darrein Preſentment*, or in an Action of *Quare impedit.*

NO Damages were recoverable at the Common Law in an Aſſize of *Darrein Preſentment*, or in an Action of *Quare impedit.* 2 Inſt. 362.

By the Statute of 2 *Weſtm. c.* 5. it is enacted, " That from hence-" forth in Writs of *Quare impedit* " and *Darrein Preſentment* Damages " ſhall be awarded, to wit, if the " Time of ſix Months ſhall paſs by " the Diſturbance of any Perſon, ſo " that the Biſhop do collate to the " Church, and the true Patron loſe " his Preſentation for that Time, " Da-

" Damages ſhall be awarded to two " Years Value of the Church; and " if the Time of ſix Months ſhall " not paſs, but the Preſentment be " deraigned within the ſaid Time, " then Damages ſhall be awarded to " half a Year's Value of the Church."

2 Inſt. 363. The Value of the Church in computing Damages in an Aſſize of *Darrein Preſentment*, or in an Action of *Quare impedit*, is always to be eſtimated at what the Church might have been letten for.

Ibid. If ſix Months have paſſed ſince the Church became void, and the Biſhop have not collated, the Plaintiff in an Action of *Quare impedit* has an Election to pray a Writ to the Biſhop; in which Caſe as he does not loſe his Preſentation for that Time, he can only recover Damages to the Amount of half a Year's Value of the Church; or as the Right of collating

lating has accrued to the Biſhop, he may proceed in the Action, in order to recover Damages to the Amount of two Years Value of the Church; but if he elect to do the latter he loſes his Preſentation for that Time.

If ſix Months have paſſed ſince the Church became void, and the Biſhop have collated, yet if the Incumbent be afterwards removed, in Conſequence of a Judgment in an Action of *Quare impedit*, Damages can only be recovered to the Amount of a half Year's Value of the Church; becauſe the Plaintiff does not in this Caſe loſe his Preſentation for that Time. 2 Inſt. 363.

Damages are recoverable in an Action of *Quare impedit* againſt every Diſturber of the Patron in his Right of preſenting. Ibid.

2 Inſt. 363. Every Perſon who counterpleads the Right of the Patron to preſent, is in the Eye of the Law a Diſturber of him in his Right of preſenting.

Bro. Brief al Eveſque pl. 14. If the Defendant in an Action of *Quare impedit* plead *ne diſturbe Pas*, the Plaintiff is entitled to a Writ to the Biſhop, and likewiſe to a Writ of Enquiry for the aſſeſſing of Damages.

As an Action of *Quare impedit* has been much more frequently brought than an Aſſize of *Darrein Preſentment*, it follows, that the Determinations concerning Damages have uſually been in Actions of *Quare impedit*: But what has been determined concerning Damages in Actions of *Quare impedit*, does in the general apply to Aſſizes of *Darrein Preſentment*.

CHAP.

CHAP. IX.

Of Damages in an Action of Account.

AS the Law does not appear to be ſettled concerning the Recovery of Damages in an Action of Account, it will be proper to mention the principal Caſes upon the Point.

It is laid down in divers Caſes, that no Damages are recoverable in an Action of Account. Bro. Dam. Pl. 136. Pl. 166. Dal. 18. Pl. 12. 1 Rol. Abr. 575. Pl. 17. Fitzh. Dam. Pl. 19.

But it is in one Caſe laid down, that although the Plaintiff in an Action of Account cannot recover Damages *eo nomine*, he may virtually recover Damages; in as much as he may recover what the Defendant

ſhall upon taking the Account before the Auditors be found in Arrear.

1 Rol. Abr. 575. Pl. 27. And it is in another Caſe laid down, that in an Action of Account againſt a Man as Receiver of Money to merchandize with, Damages are recoverable for the Profit which has been or might have been made of the Money.

Fitz. Account, Pl. 45. 2 Ric. 2. It is in one Caſe laid down, that Damages are not recoverable in an Action of Account againſt a Man as Receiver of Money to deliver over, or to redeliver upon Requeſt.

2 Leon. 230. Collet v. Robſon, Mic. 31 Eliz. It is in one Caſe laid down, that Damages are recoverable in an Action of Account, againſt a Man as Receiver, to render an Account: And *per cur.* if a Bailiff by employing the Money received might have made a Profit for

for his Principal, and has neglected to do it, he ought to make a Satisfaction for the Neglect. But it is very doubtful whether this Case be Law.

For it is in a subsequent Case laid down, that if the Defendant in an Action of Account against him as Receiver to render an Account come at the first Day, and submit to Account, the Plaintiff cannot recover Damages: But that if the Defendant plead *ne unques son Receiver* he is liable to Damages. 1 Rol. Abr. 575. Pl. 29. Pl. 30 Trin. 4. Ja. 1.

And it is in another subsequent Case laid down, that if the Defendant in an Action of Account against him as Receiver to render an Account come at the first Day, and submit to Account, the Plaintiff cannot recover Damages: But that if the Defendant plead to the Action he is liable to Damages. Nov. 134. Brown v. Barwick, Trin. 7 Ja. 1.

March 99. Anon. Trin. 17. Car. 1. It is in one Caſe ſaid to be clear Law, that Damages are recoverable upon the ſecond Judgment in an Action of Account.

It may from this laſt Caſe be fairly inferred, that if there be no ſecond Judgment in an Action of Account, which there never can be, unleſs the Defendant plead to the Action, no Damages are recoverable therein unleſs the Defendant plead to the Action.

Dal. 18. Pl. 12. Anon. 2 Ph. & M. It is in one Caſe laid down as clear Law, that the Plaintiff in an Action of Account cannot recover Damages: But it is ſaid by *Hale*, that the Books are agreed, that if the Defendant in an Action of Account plead in Diſcharge of the Account before the Auditors, and Iſſue be joined upon the Plea, and it be found againſt him, the Plaintiff ſhall recover Damages.

CHAP.

CHAP. X.

Of Damages in an Action of *Aſſumpſit.*

IT ſeems to have been formerly holden, that if the Plaintiff in an Action of *Aſſumpſit* had declared upon an *Indebitatus Aſſumpſit*, he could not recover Damages to a leſſer Amount than the Sum alledged to be due.

In an Action of *Aſſumpſit* wherein the Plaintiff had declared upon an *Indebitatus Aſſumpſit*, the Sum of fifty Pounds was alledged to be due. There was a Verdict for the Plaintiff with Forty-ſeven Pounds Damages, and as to the Reſidue the Jury found, that the Defendant did not promiſe to pay it. The Verdict was ſet aſide, and

Cro. Eliz. 292. Bagnall v. Sacheverel.

and a Verdict was ordered to be entered for the Defendant; becauſe Damages were aſſeſſed to a leſſer Amount than the Sum alledged to be due.

But however it may have been formerly holden, it is at this Day certain, that Damages may be recovered in an Action of *Aſſumpſit* to a leſſer Amount than the Sum alledged to be due; notwithſtanding the Plaintiff has declared upon an *Indebitatus Aſſumpſit*.

Clayt. 87. Ramſden's Caſe. In an Action of *Aſſumpſit*, wherein the Plaintiff had declared upon an *Inſimul Computaſſet*, it was holden that the Plaintiff could not recover Damages to a leſſer Amount than the Ballance alledged to be due.

M. S. Rep. Thompſon v. Spencer, Eaſt. 8 G. 3. K. B. But it was in a very late Caſe holden, that the Plaintiff in an Action of *Aſſumpſit*, who has declared upon an *Inſimul Computaſſet*, may recover

cover Damages to a leſſer Amount than the Ballance alledged to be due; and by *Yates* J. the Caſe cited from *Clayton's Rep.* which has been relied upon as a Caſe in Point, is not Law. The Damages alledged in an Action of *Aſſumpſit* are diviſible; for the Promiſe, whether it be an expreſs or an implied one, muſt always follow, and can never extend further than the ſum that is juſtly due. If this be ſo, the Jury in aſſeſſing Damages in an Action of *Aſſumpſit*, have certainly a Power to divide the Damages alledged in ſuch a Manner, that the Plaintiff may recover Damages to the Amount of what is juſtly due.

In an Action of *Aſſumpſit*, wherein the Plaintiff had declared upon a Policy of Inſurance, a total Loſs of the Goods inſured was alledged. At the Trial of the Cauſe it appeared, that only a partial Loſs thereof had been ſuſ-

M. S. Rep. Gardiner v. Croaſdale Mich. 33 G 2. in K. B.

ſuſtained; and a queſtion aroſe whether the Jury could aſſeſs Damages for the partial Loſs. It was ruled by Lord *Mansfield* Ch. J. that they might; and Damages were ſo aſſeſſed. A Caſe being reſerved it was holden that the Jury had done right; and by Lord *Mansfield* Ch. J. as the Policy was intended to be an Indemnification to the Plaintiff, it is highly reaſonable that he ſhould recover Damages for the Loſs he has ſuſtained.

If in an Action of *Aſſumpſit* the Plaintiff has declared upon a catching Contract, Damages may be aſſeſſed to the Amount of a leſſer Sum than would have been due, in Caſe the Contract had not been a catching one.

1 Lev. 111. James v. Morgan. In an Action of *Aſſumpſit* the Plaintiff declared upon a Contract, by which he was to be paid for a Horſe ſold to the Defendant at the Rate of

of one Barley-corn for the firſt Nail in the Horſe's Shoes, two for the ſecond, and that the Barley-corns ſhould be doubled for every other Nail. As there were thirty-two Nails in the Horſe's Shoes, the Plaintiff purſuant to the Contract ought to have received five hundred Quarters of Barley; but by the Direction of *Hyde* J. before whom the Cauſe was tried, Damages were aſſeſſed to the Amount of only eight Pounds, that being the Value of the Horſe.

In an Action of *Aſſumpſit* the Plaintiff declared upon a Promiſe made the 19th of *June* 1718, to pay for Neceſſaries provided for his Son, and alledged that he provided Neceſſaries for five Years and nine Months thence following: There being Judgment againſt the Defendant by Default, the Jury upon a Writ of Enquiry, which was executed the third of *February*, 1723, aſſeſſed Damages, for

Lord Raym. 1392. Baker & Bache.

for the five Years and nine Months Neceſſaries, and final Judgment was given for the Plaintiff. An Action of Error being brought the Judgment was reverſed; becauſe Damages were aſſeſſed for Neceſſaries provided both after the Action was brought, and after the Writ of Enquiry was executed; for the five Years and nine Months, if the Months were to be computed as calendar Months, did not expire until the 15th of *March* 1723; and if they were to be computed as lunar Months, not until the 25th of *February* 1723.

M. S. Rep. Robinſon v. Bland, Mich. 1. G. 3 K. B.

In an Action of *Aſſumpſit* the Plaintiff declared upon a Bill of Exchange carrying Intereſt, which appeared to be given for three hundred Pounds loſt at Play, and for three hundred Pounds lent at the Time of playing. It was holden, that as Part of the Conſideration for the Bill was Money loſt, it was void as a Security

curity as to ſo much, and conſequently that it could not be good as a Security as to the Reſidue. But it was likewiſe holden, that as an Action lies for the Money lent at the Time of playing, the Bill, although void as a Security, is Evidence of a Contract to pay that Money with Intereſt, and conſequently that the Plaintiff ought to recover that Money with Intereſt from the Date of the Bill.

In an Action of *Aſſumpſit* the Jury, in aſſeſſing Damages, computed Intereſt for what was due to the Plaintiff upon the Balance of an Account: It was holden that they ought not to have done this; for that Intereſt ought only to be allowed in the Caſe of a promiſſory Note, or in that of a Bill of Exchange. 1 Barn. 14. Pinnock v. Willet.

Upon a Motion for a new Trial in an Action of *Aſſumpſit* it appeared, M. S. Rep. Smee v. Huddleſtone, Trin. 8 G. 3. C. B.

ed, that the Plaintiff's Broker had contracted with the Defendant on the firſt Day of *October* for ſome Tea, which the Plaintiff had bought at a Sale of the *Eaſt India* Company; that the Tea, which was in the Company's Warehouſe, was to be paid for on the firſt Day of *December*; that the Warrant, which was the Evidence of the Plaintiff's Property in the Tea, was not delivered to the Defendant at the Time of the Contract; that the Warrant was tendered to him on the firſt Day of *December*, but that he refuſed to accept thereof; and that the Tea was afterwards ſold at a publick Sale for two hundred Pounds leſs than the Defendant had contracted to pay for it. The Jury having by the Direction of *Wilmot* Ch. J. aſſeſſed Damages to the Amount of two hundred Pounds, the Queſtion was, whether they ought not to have aſſeſſed Damages to the Value of the Tea. It was holden

holden that they ought not, and by *Wilmot* Ch. J. it has been inſiſted that there was in this Caſe an abſolute Sale of the Tea, or at leaſt a conditional one which became abſolute upon the Tender of the Warrant; and that in either Caſe Damages ought to have been aſſeſſed to the Value of the Tea. I was of Opinion at the Trial of the Cauſe. and am ſo ſtill, that as the Warrant was not delivered at the Time of making the Contract, it was not a Contract executed, but a Contract executory, it being a Contract to ſell at a future Time. But admitting it to have been a Contract executed, there is even then no Reaſon that the Plaintiff ſhould recover Damages to a greater Amount than the Loſs he ſuſtained by the Non-performance of the Contract, which is certainly no more than the Difference between what the Defendant had contracted to

pay for the Tea, and what it was afterwards ſold for.

Raym. 77. Nurſe v. Barns. In an Action of *Aſſumpſit* the Plaintiff alledged, that the Defendant in Conſideration of ten Pounds to him paid promiſed to let him enjoy a certain Iron Mill. It appeared at the Trial of the Cauſe that the Mill would not let for more than twenty Pounds a Year: But as it appeared likewiſe that the Plaintiff, by Reaſon of his not being permitted to enjoy the Mill according to the Contract, loſt a Stock which he had laid in, the Jury aſſeſſed Damages to the Amount of five hundred Pounds. It was holden that the Damages were not exceſſive, and *per cur.* the Jury in aſſeſſing Damages in this Caſe were not confined to the Sum paid as a Conſideration for the Enjoyment of the Mill, or to the Sum that the Mill would let for; but had a Right to

to take all the Circumſtances of the Caſe into Conſideration.

CHAP. XI.

Of Damages in an Action upon the Caſe.

IT was ſaid by *North* Ch. J. that in an Action upon the Caſe for Words in themſelves actionable, the Jury in computing Damages ought to conſider not only what Damages it is probable the Plaintiff did ſuſtain before the bringing of the Action; but alſo what Damages it is probable he will ſuſtain in Time to come; becauſe a ſubſequent Action will not lie for the ſame Words: But that if the Words are not in them-

2 Mod. 150. Lord Townſhend v. Hughes.

themſelves actionable, the Jury in computing Damages ought only to conſider the Damage which is ſpecially alledged and proved; becauſe if any Damage be at a future Time ſuſtained a ſubſequent Action will lie for it.

2 Mod. 150 Lord Townſhend v. Hughes.

It was however in the ſame Caſe ſaid by *Atkins* J. that in an Action upon the Caſe for Words in themſelves actionable, the Jury in computing Damages ought only to conſider what Damages it is probable the Plaintiff did ſuſtain before the bringing of the Action.

Stra. 1200, Underwood v. Parks.

Heretofore the Truth of the Words for which an Action upon the Caſe was brought, might be given in Evidence upon the general Iſſue in Mitigation of Damages.

But at a meeting of all the Judges it was agreed by a great Majority of them,

them, that for the Time to come the Truth of the Words, for which an Action upon the Caſe is brought, ſhall not be given in Evidence upon the general Iſſue in Mitigation of Damages: For that unleſs the Defendant have pleaded that the Words are true, it is not probable that the Plaintiff ſhould come prepared to prove them falſe.

In an Action upon the Caſe for reſcuing a Perſon under an Arreſt, Damages may be recovered to the Amount of the Debt for which the Arreſt was. Lane 70. Kent v. Keilway.

In an Action upon the Caſe againſt a Sheriff for a falſe Return, in returning *non eſt inventus* to a *Capias ad ſatisfaciendum*, which had iſſued upon a Judgment againſt *J. S.* for forty-three Pounds, it was proved at the Trial of the Cauſe, that one of the Sheriff's Bailiffs had frequently had Lord Raymond 1411. Powell v. Hord.

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an Opportunity of arreſting *J. S.* and that *J. S.* had of late abſconded. Damages having, by the Direction of *Raymond* C. J. been aſſeſſed to the Amount of forty-three Pounds, the Queſtion was, whether a new Trial ſhould be granted, it was holden that it ſhould not, and *per cur.* Upon the Circumſtances of this Caſe the Jury did right in aſſeſſing Damages to the Amount of the whole Debt.

M. S. Rep. Ravenſcroft v. Eyles, Hil. 6 G. 3. in C. B.

In an Action upon the Caſe againſt a Gaoler, for the Eſcape of a Perſon in Cuſtody on *meſne* Proceſs, it was proved at the Trial of the Cauſe, that the Debt was ſperate; but it being likewiſe proved that the Eſcape was voluntary, the Jury, by Direction of Lord *Camden*, C. J. aſſeſſed Damages to the Amount of the whole Debt. A new Trial being moved for the Court were unanimouſly of Opinion againſt the granting of one; and by *Bathurſt* J. it has been inſiſted, that in an

an Action upon the Caſe, againſt a Gaoler for the Eſcape of a Perſon in Cuſtody on *meſne* Proceſs, the Jury ought not to aſſeſs Damages to the Amount of the whole Debt, in Caſe the Debt be ſperate. This appears to me to be a Miſtake; for I take it to be a ſettled Point, that if the Eſcape was a voluntary one, it is the Duty of the Jury, whether the Debt be ſperate or not, to aſſeſs Damages to the Amount of the whole Debt.

It is admitted that Damages may be recovered in an Action upon the Caſe for a Nuſance, for an Injury which is the Conſequence of the Nuſance, notwithſtanding the Nuſance was removed before the Injury was received; and by *Holt* Ch. J. as the Giſt of an Action upon the Caſe for a Nuſance is Damages, it is not material at what Time an Injury which was the Conſequence of a Nuſance was received. 12 Mod. 519.

CHAP.

CHAP. XII.

Of Damages in an Action of Covenant.

2 Rol. Abr. 703. Hicks v. Goats.

IN an Action of Covenant the Plaintiff alledged, that upon the Sale of Land to him, which was eſtimated at a certain Number of Acres, the Defendant covenanted to pay him at the Rate of eleven Pounds by the Acre, for as many Acres as ſhould be wanting of the Number of Acres the Land was eſtimated at; and he further alledged, that as many Acres were wanting, as did at the Rate of eleven Pounds by the Acre amount to ſeven hundred Pounds. The Defendant pleaded, that there were not ſo many Acres wanting, as did at the Rate of eleven Pounds by the

the Acre amount to ſeven hundred Pounds. Iſſue being joined upon the Plea, a Verdict was found for the Plaintiff with Damages to the Amount of only four hundred Pounds. An Action of Error being brought the Verdict was holden to be good, and *per cur.* as the Giſt of an Action of covenant is Damages, it is entirely in the Breaſt of the Jury to aſſeſs ſuch as appear to them to be reaſonable.

In another Report of this Caſe no Notice is taken of the Smallneſs of the Damages aſſeſſed by the Jury. Cro. Ja. 391.

And in a very late Caſe a Doctrine is laid down, which is quite contrary to what is laid down in the Caſe of *Hicks* and *Goats* as reported by *Rolle*.

The Covenant, for the Breach of which an Action was brought, was in theſe Words, " I hereby promiſe " *Catharine* M. S. Rep. Lowe v. Peers, Eaſt. 8 G. 3. K. B.

" *Catharine Lowe*, that I will not " marry any Perſon except herſelf; " if I do, I agree to pay her a thou- " ſand Pounds within three Months " after Marriage": The Jury who tried the Cauſe did, by the Direction of Lord *Mansfield* Ch. J. aſſeſs Damages to the Amount of a thouſand Pounds. Upon a Motion for a new Trial it was inſiſted, that the Jury ought not to have been directed to aſſeſs Damages to the Amount of the Sum mentioned in the Covenant; for that the *Quantum* of Damages in an Action of Covenant is always a Matter proper for the Conſideration of the Jury; and the Caſe of *Hicks* and *Goats*, in which the Jury had aſſeſſed a leſſer Sum for Damages than was mentioned in the Covenant, was relied upon. A new Trial was refuſed; and by Lord *Mansfield* Ch. J. the Caſe of *Hicks* and *Goats* is not reconcileable to any Principle either of Law or Equity: For wherever

wherever there is a Covenant that a certain Sum ſhall be paid in a certain Caſe, the Jury cannot aſſeſs Damages for the Breach of the Covenant to a leſſer Amount than the Sum therein mentioned.

It is ſaid by *Holt* Ch. J. that in Action of Covenant for not doing Repairs, it has always been the Practice to give good Damages, namely full as much as it will coſt to put the Premiſſes into Repair, notwithſtanding the Action be brought during a Term the Defendant has in the Premiſſes, and he be obliged to leave them in Repair at the Expiration of the Term. Lord Raym. 1126. Vivian v. Champion

Upon a Writ of Enquiry in an Action of Covenant, in which the Breach aſſigned was not repairing certain Premiſſes, the Jury in aſſeſſing Damages computed the Lord Raym. 803. Shortridge v. Lamplugh.

Expence the Plaintiff had been at in doing Repairs which became neceſſary, between the Time of commencing the Action and that of awarding the Writ of Enquiry, and the Plaintiff had Judgment. An Action of Error being brought the Judgment was affirmed; and *per cur.* if it appeared to the Jury that the Premiſſes became more out of Repair after the Commencement of the Action, they did right to conſider this in aſſeſſing Damages.

1 Barn: 151. Townſhend. v. Pool.

Three Breaches being aſſigned in an Action of Covenant, the Defendant confeſſed the Action as to one of them, and Iſſue was joined as to the other two. *A Venire facias* was awarded to try the Iſſue, and to aſſeſs Damages as to the Breach confeſſed. A Verdict being found for the Plaintiff upon the Iſſue, the Jury aſſeſſed Damages as to the Breaches upon which this was joined; but they neglected

glected to assess Damage as to the Breach which was confessed. A Writ of Enquiry was afterward awarded for the assessing of Damages as to this Breach.

CHAP. XIII.

Of Damages in an Action of Debt.

DAMAGES are recoverable in an Action of Debt on Account of the Detention of the Debt: But none are recoverable on Account of the Debt, this being recoverable *in numero.*

If the Defendant in Action of Debt plead *tout temps prist*, and bring the Money due into Court, the Plain- Comb. 244 Cutlers Comp. v. Hurfler.

Plaintiff, in order to enable himſelf to recover Damages, muſt reply a ſpecial Demand. If this be replied, and the Iſſue joined upon the Replication be found for the Defendant, the Plaintiff is intitled to the Money brought in: But cannot recover any Damages, becauſe there has not been a Detention of the Debt.

Lord Raym. 773. Lapier v. the Duke of St. Albans.

If in an Action of Debt brought upon a ſingle Bill, which always carries Intereſt, there be a Verdict for the Plaintiff, Damages ought to be aſſeſſed to the Amount of what is due for Intereſt.

It is uſual in an Action of Debt upon a Bond, in Caſe there be a Verdict for the Plaintiff, to have only nominal Damages aſſeſſed; nor is it in the general neceſſary to have Damages aſſeſſed to the Amount of what is due for Intereſt: Becauſe as the Plaintiff is entitled under the Ver-

Verdict to the whole Sum mentioned in the Penalty of the Bond, this, which is uſually double the Sum mentioned in the Condition, is for the moſt Part ſufficient to cover what is due for Intereſt.

By the 8 and 9 *W.* 3. *c.* 11. *p.* 8. it is enacted, "That in all Actions "upon a Bond, brought for Non-"performance of any Covenant or "Agreement in any Deed or Wri-"ting contained, the Plaintiff may "aſſign as many Breaches as he ſhall "think fit, and the Jury ſhall aſſeſs "not only Damages and Coſts of "Suit as heretofore, but alſo Da-"mages for ſuch of the ſaid Breaches "as the Plaintiff ſhall prove, and "Judgment ſhall be entered as hath "been uſually done; and if Judg-"ment ſhall be given for the Plain-"tiff on a Demurrer, by Confeſſion "or *Nil dicit*, the Plaintiff may ſug-"geſt upon the Roll as many

" Breaches as he ſhall think fit, upon
" which a Writ ſhall iſſue to the
" Sheriff of the County where the
" Action ſhall be brought, to ſum-
" mon a Jury to appear before the
" Juſtices of Aſſize or *Niſi Prius* of
" that County, to enquire of the
" Truth of the ſaid Breaches, and
" to aſſeſs the Damages that the
" Plaintiff ſhall have ſuſtained there-
" by; and in Caſe the Defendant,
" after Judgment entered, and be-
" fore Execution executed, ſhall pay
" into Court to the Uſe of Plaintiff
" or his Executors or Adminiſtrators
" ſuch Damages, together with Coſts
" of Suit and reaſonable Charges for
" ſuing out the Execution, the Body,
" Lands and Goods of the Defendant
" ſhall be diſcharged from the ſaid
" Execution: But the Judgment
" ſhall afterwards remain as a Secu-
" rity to the Plaintiff, and his Ex-
" ecutors and Adminiſtrators, for
" ſuch Damages as ſhall be ſuſtained
" by

" by a further Breach of a Covenant " in the ſaid Deed or Writing."

It has been holden, that the Plaintiff in an Action of Debt on a Bond for the Performance of Covenants, has, ſince the making of this Statute, an Election to proceed thereupon or to proceed at the Common Law. Com. 377. Walker v. Prieſtly, Mic. 10 G. 1.

But a contrary Doctrine has been laid down in a very late Caſe.

In an Action of Debt upon a Bond for Performance of Covenants, two Breaches of Covenant were aſſigned, and there was a Verdict for the Penalty with nominal Damages. A *Venire facias de novo* was awarded on Account of the defectiveneſs of the Verdict, in not aſſeſſing the Damages ſuſtained by the Breaches of Covenant; and by *Wilmot* Ch. J. the Proviſion of the 8 and 9 *W* 3. *c.* 11. is made as well for the Benefit of the De- MS. Rep. Drage v. Brand, Trin. 8 G. 3. C. B.

Defendant in an Action of Debt upon a Bond for the Performance of Covenants, as for that of the Plaintiff, that both Parties may have complete Juſtice without going into a Court of Equity. If this be ſo, the Plaintiff in ſuch Action has not ſince the making of that Statute an Election to proceed thereupon, or to proceed at the Common Law; but muſt proceed upon the Statute.

If it ſhould be admitted that the Plaintiff has, ſince the making of that Statute, an Election to proceed thereupon, or to proceed at the Common Law, the Plaintiff has in the preſent Caſe made his Election to proceed upon the Statute; for he has aſſigned two Breaches of Covenant, which he could not have done if he had proceeded at Common Law.

CHAP.

CHAP. XIV.

Of Damages in an Action of Detinue.

DAMAGES are recoverable in an Action of Detinue, on Account of the Detention of the Thing for which the Action is brought.

But if the Defendant in an Action of Detinue come at the firſt Day, and plead that he hath at all Times been ready to deliver the Thing for which the Action is brought to the Plaintiff, he is not liable to Damages on Account of the Detention thereof. 1 Rol. Abr. 574. Pl. 4. pl. 5.

It

Jenk. 288. Pl. 23. 1 Sid. 246. It is in the general true, that Damages are not recoverable in an Action of Detinue on Account of the Thing for which the Action is brought, this being recoverable in Specie.

Jenk. 288. Pl. 23. But if it appear, by the Return of the Sheriff to a Writ of *Diſtringas*, which has iſſued upon a Judgment in an Action of *Detinue*, that he has not been able to deliver the Thing for which the Action is brought to the Plaintiff, Damages to the Value thereof may be aſſeſſed upon a Writ of Enquiry.

CHAP.

CHAP. XV.

Of Damages in an Action for a Penalty.

IT is said to be the better Opinion, that if a Sum of Money be given by a Statute by Way of Penalty, and a new Writ be given for the Recovery thereof, the Money cannot be recovered unleſs an Action be commenced by the new Writ: But that if a Sum of Money be given by the Statute by Way of Penalty, and no new Writ be given for the Recovery thereof, the Money may be recovered in an Action commenced by a common Law Writ. Bro. Dam. Pl. 8.

If a certain Sum of Money be given by a Statute by Way of Penalty Cro. Car. 559. North v. Wingate.

nalty to the Party grieved by an Injury, the Party grieved may in Action of Debt, beſides recovering the Money, recover Damages for the Detention thereof; becauſe the Money, it being a Sum certain, is to be conſidered as a Debt.

1 Rol Abr. 574. North v. Muſgrave.

But if a certain Sum of Money be by Way of Penalty given by a Statute to the Perſon ſuing for the ſame, and an Action of Debt be brought for it by a common Informer, he cannot recover Damages for the Detention of the Money; for as the Plaintiff had not the leaſt Pretence of Right to the Money before the Action was commenced, it would be ſtrange to hold, that the Defendant did before the Commencement of the Action detain it from him.

Cro. Ja. 70. Dagge v. Kent.

If an uncertain Sum of Money, as double or treble Damages, be by Way of Penalty given by a Statute to the Par-

Party grieved by an Injury, the Party grieved may recover the Money; but he cannot recover Damages for the Detention thereof, becauſe the Money, it being an uncertain Sum, is not to be conſidered as a Debt.

In an Action upon the 1 and 2 *P.* and *M. c.* 12. againſt three Perſons for impounding Cattle diſtrained in ſeveral Places, ſo that the Owner was put to the Expence of ſeveral Writs of *Replevin*, Iſſue was joined upon the Plea of Not guilty, and there was a Verdict for the Plaintiff, with Forty Shillings Damages againſt each of the Defendants. Judgment being entered up on the Verdict againſt each of the Defendants, for the Penalty of Five Pounds, and likewiſe for treble the Damages aſſeſſed by the Jury, it was afterwards reverſed in an Action of Error; and *per cur.* notwithſtanding the Words of the Statute are, that every Perſon

Noy 62. Patridge v. Empſon.

offending contrary thereto, ſhall forfeit to the Party aggrieved *for every Offence* Five Pounds and treble Damages, yet the Meaning is, that the Penalty ſhall relate to the Offence and not to the Perſon. Conſequently, as there has been in this Caſe no more than one Offence, the Plaintiff ought to recover only one Penalty. And the Damages ought to be but once trebled.

CHAP.

CHAP. XVI.

Of Damages in an Action of *Replevin*, or in an Action of Second Deliverance.

DAMAGES are recoverable at the Common Law by the Plaintiff in an Action of *Replevin*, and in an Action of Second Deliverance.

If in an Action of *Replevin* brought by a Bailiff to a Lord of a Manor, the Lord join with the Bailiff in an Avowry, the Bailiff is liable to Damages, but the Lord is not. Bro. Dam. Pl. 68.

If the Plaintiff in an Action of *Replevin* declare in the *Detinet*, he may recover Damages for the detaining Cro. Eliz. 59. Ash v. Wood.

of the Thing diſtrained, as well as for the taking thereof.

No Damages are recoverable at the Common Law by the Defendant in an Action of *Replevin*, or in an Action of Second Deliverance.

By the 7 *H.* 8. *c.* 4. *p.* 3. it is enacted, " That every Avowant, " and every Perſon who makes " Avowry or Conuſance, or juſtifies " as Bailiff, in any Replegiare or Se- " cond Deliverance, for any Rent, " Cuſtom or Service, if his Avowry, " Conuſance or Juſtification be found " for him, or the Plaintiff be other- " wiſe barred, he ſhall recover Da- " mages."

By the 21 *H.* 8. *c.* 19. *p.* 3. it is enacted, " That every Avowant, " and every Perſon who makes any " Avowry, Juſtification or Conu- " ſance as Bailiff or Servant, in any " Re-

" Replegiare or Second Deliverance,
" for Rents, Cuſtoms or Services,
" or for Damage feaſant or other
" Rent, upon any Diſtreſs taken in
" any Lands or Tenements, if the
" Avowry, Conuſance or Juſtifi-
" cation be found for him, or the
" Plaintiff be non-ſuited or other-
" wiſe barred, he ſhall recover Da-
" mages."

It has been holden, that although the Power of avowing or making Conuſance be given to an Executor by the 32 *H.* 8. *c.* 37. which is ſubſequent to both the Statutes whereby Damages are given to an Avowant, or to one who makes Conuſance, and Damages are not mentioned in the 32 *H.* 8. *c.* 37. an Executor who avows or makes Conuſance may recover Damages. 2 Roll. Rep. 457. Farnell v. Keightley.

It is laid down, that the Defendant in an Action of *Replevin*, who avows for an Amercement by a Court Moor 893. Cro. Ja. 520.

Leet or Court Baron, may recover Damages.

Cro. Eliz. 258, 300. Cro. Car. 534. But it ſeems to be the better Opinion, that the Defendant in this Action cannot recover Damages in ſuch Caſe; becauſe it is not one of the Caſes in which Damages are given by the 7 *H.* 8. *c.* 4. or the 21 *H.* 8. *c.* 19.

Hard. 153. If the Defendant in an Action of *Replevin* plead Property in the Thing diſtrained, he cannot recover Damages, this not being one of the Caſes in which Damages are given by the 7 *H.* 8. *c.* 4. or the 21 *H.* 8. *c.* 19.

Cro. Ja. 473. Dent v. Parſons. In an Action of *Replevin* the Defendant avowed for Thirty-ſix Pounds an Arrear of Rent; the Plaintiff as to Twelve Pounds pleaded Payment, and as to the Reſidue that it was not in Arrear. Iſſues being joined upon

upon both Pleas, the Iſſue upon the firſt was found for the Plaintiff, and Damages were aſſeſſed thereupon for him. The Iſſue upon the other Plea being found for the Defendant, Damages were aſſeſſed thereupon for him. It was holden, that as Part of the Rent was found to be in Arrear, the Defendant was intitled to the Damages aſſeſſed for him upon the ſecond Plea; but that the Plaintiff was not intitled to the Damages aſſeſſed for him upon the firſt.

It may be inferred from one Caſe, that if in an Action of *Replevin* the Defendant avow for Damage feaſant, and the Plaintiff at the Trial of the Cauſe be non-ſuited, the Jury impanelled to try the Cauſe may aſſeſs Damages. Comb. 11. Humphreys v. Miſdale.

In another Caſe it is ſaid to be every's Day's Practice for the Jury to aſſeſs Damages for the Defendant, in Caſe 5 Mod. 76. Gardner v. Hall.

Caſe the Plaintiff in an Action of *Replevin* be non-ſuited.

By the 17 *Car.* 2. *c.* 7. it is enacted, " That if the Plaintiff in *Re-*
" *plevin* ſhall be non-ſuit before Iſ-
" ſue joined, in any Suit depending
" in any of the King's Courts at
" *Weſtminſter*, upon the Defendant's
" making a Suggeſtion of the Ar-
" rear of Rent, the Court ſhall a-
" ward a Writ to the Sheriff of the
" County where the Diſtreſs was
" taken, to enquire touching the
" Sum in Arrear, and the Value of
" the Goods or Cattle diſtrained,
" and upon the Return of the In-
" quiſition the Defendant ſhall have
" Judgment to recover the Arrear
" of Rent, in Caſe the Goods or
" Cattle diſtrained ſhall amount to
" that Value, and in Caſe they ſhall
" not amount to that Value, then ſo
" much as they ſhall amount unto:
" And

" And in Caſe the Plaintiff ſhall be " nonſuit after Iſſue joined, or a " Verdict ſhall be given againſt him, " the Jurors impanelled to try the " Iſſue ſhall enquire concerning the " Sum in Arrear, and the Value of " the Goods or Cattle diſtrained; " and the Avowant, or he who mak- " eth Conuſance ſhall have Judg- " ment for the Arrear of Rent, or " for ſo much thereof as the Goods " or Cattle amount unto."

By the ſame Statute, *p.* 3, it is enacted, " That if Judgment in any " of the Courts aforeſaid be given " upon a Demurrer for the A- " vowant in an Action of *Reple- " vin*, or him who maketh Conu- " ſance for Rent, the Court ſhall " award a Writ to enquire of the " Value of the Diſtreſs, and upon " the Return thereof Judgment " ſhall be given for the Arrear of " Rent alledged, if the Goods

" or

" or Cattle diſtrained ſhall amount " to that Value, and in Caſe they " ſhall not amount to that Value, " then for ſo much as they ſhall " amount unto."

Lord Raym. 788. Smith v. Walker.

The Defendant in an Action of *Replevin*, who has obtained Judgment upon a Plea in Abatement, is not in the general intitled to Damages, this not being one of the Caſes, in which Damages are given by the 7 *H.* 8. *c.* 4. the 21 *H.* 8. *c.* 19. or the 17 *Car.* 2. *c.* 7.

Ibid.

But it has been holden, that if the Judgment obtained by the Defendant in an Action of *Replevin* upon a Plea in Abatement be peremptory, he is intitled to Damages, notwithſtanding this is not a Caſe within the Letter of the 7 and 8 *H.* 8. *c.* 4. the 21 *H.* 8. *c.* 19. or the 17 *Car.* 2. *c.* 7.

By

By the 43 *Eliz. c.* 2. *p.* 19. it is enacted, " That if in an Action of " *Replevin* for taking a Diſtreſs by " Virtue of this Statute the De- " fendant plead Not guilty, or make " Avowry or Conuſance, and the " Iſſue joined in the Action be found " for the Defendant, or the Plain- " tiff be nonſuited after Appear- " ance, the Defendant ſhall recover " treble Damages, to be aſſeſſed by " the ſame Jury, or upon a Writ to " enquire of Damages, as the ſame " ſhall require."

CHAP.

CHAP. XVII.

Of Damages in an Action of Treſpaſs.

Bro. Dam. Pl. 131.

IF in an Action of Treſpaſs againſt two one appear and plead, and be found guilty, and Damages are aſſeſſed; and there be afterwards Judgment by Default againſt the other, he is liable to the Damages already aſſeſſed.

10 Rep. 119. Cheyney's Caſe.

If in an Action of Treſpaſs againſt two one appear and plead and be found guilty, and Damages are aſſeſſed, and afterwards the other appear and plead and be likewiſe found guilty, no further Damages are to be aſſeſſed: Becauſe Damages for the whole Treſpaſs, to which the Defendant in the latter Cauſe is liable, have been aſſeſſed in the former Cauſe.

The

The ſame is laid down in another Caſe, and it is therein ſaid, that the Defendant in the ſecond Cauſe has no Reaſon to complain of being liable to the Damages aſſeſſed in the former Cauſe; for that if theſe are exceſſive he may have an Action of Attaint. 11 Rep 6. Heydon's Caſe.

In an Action of Treſpaſs againſt two one appeared and pleaded Not Guilty, and a *Venire facias* was awarded to try the Iſſue joined upon the Plea. Afterwards the other appeared and pleaded Not guilty, and another *Venire facias* was awarded to try the Iſſue joined upon the Plea. The Iſſues being both tried at the ſame Aſſizes, the Jury who tried the firſt Iſſue aſſeſſed Damages to the Amount of Two Hundred Pounds; but the Jury who tried the ſecond Iſſue aſſeſſed Damages to the Amount of only Fifty Pounds. It was holden that the Plaintiff might enter up Judgment upon which of 11 Rep 7. Heydon's Caſe.

the Verdicts he pleaſed; for that as both were found at the ſame Aſſizes, they are in Judgment of Law to be conſidered as found at the ſame Inſtant of Time.

Pro. Diſcont. of Proceſs. Pl. 25.

If in an Action of Treſpaſs againſt two they both plead, and afterwards one of them make Default, and an Iſſue be joined as to the other, a Writ of Enquiry may be awarded in order to prevent a Diſcontinuance: But there is no Neceſſity for it to be executed, until the Iſſue joined as to the other is tried: Becauſe if there be a Verdict for the Plaintiff, the Defendant who made Default will be liable to the Damages aſſeſſed by the Jury who try the Iſſue; and if there be a Verdict for the Defendant, the Writ of Enquiry may nevertheleſs be executed for the aſſeſſing of Damages againſt the Defendant who made Default.

In

In an Action of Treſpaſs againſt *Harris* and another, wherein *Harris* pleaded to Iſſue and there was Judgment by Default againſt the other, a *Venire facias* was awarded to try the Iſſue, and to aſſeſs Damages againſt the other. *Harris* being found Not guilty a Queſtion aroſe, whether the Jury who tried the Iſſue could proceed to aſſeſs Damages againſt the other. It was ruled by *Lee* Ch. J. that they might, and Damages were aſſeſſed. Stra. 1108, Jones v. Harris & another.

If a Perſon, who was committed upon a Charge of Felony, and after having lain a long Time in Priſon was tried and found Not guilty; bring an Action of Treſpaſs for a falſe Impriſonment, he can only recover Damages to the Time of the next Gaol Delivery after he was committed; becauſe it was not the Defen- Bro. Dam. Pl. 115.

dant's Fault that he continued in Priſon after that Time.

MS Rep. Anon.

In an Action of Treſpaſs for the *Meſne* Profits, brought after a Judgment in an Action of Ejectment againſt the caſual Ejector, the Plaintiff alledged as a ſpecial Damage, the Expence he had been at in obtaining the Judgment and recovering the Poſſeſſion of the Premiſſes. A Queſtion ariſing, whether the Plaintiff could recover Damages for this Expence, it was ruled by *Wilmot* J. before whom the Cauſe was tried, that he might: But the Caſe being new a Rule of *Niſi Prius* was made, that the Defendant ſhould be at Liberty to move for a new Trial without paying the Coſts of this Trial. The Defendant being afterwards convinced, that what was ruled at *Niſi Prius* was right, a new Trial was not moved for.

It

It has ſince this Caſe been uſual to recover Damages, in an Action of Treſpaſs for the *Meſne* Profits brought after Judgment in an Action of Ejectment againſt the caſual Ejector, for the Expence the Plaintiff has been at in obtaining the Judgment and recovering the Poſſeſſion of the Premiſſes, although this Expence was not alledged as a ſpecial Damage.

In an Action of Treſpaſs for a Battery Damages had been recovered. As part of the Plaintiff's Skull did, in Conſequence of the Battery for which the Action was brought afterwards come away, a ſecond Action was brought. A Queſtion ariſing, whether the Recovery in the firſt Action could be pleaded in Bar of the ſecond, it was holden that it might; and *per cur.* The Ground of an Action of Treſpaſs for a Battery is

Lord Raym. 692 Fetter v. Beale.

the Battery, the Conſequences thereof being only alledged in Aggravation of Damages. The Probability, that the Plaintiff would in this Caſe loſe Part of his Skull, was perhaps given in Evidence in the former Action; and the Court muſt now intend that it was, and that the Jury did, in aſſeſſing Damages, take that into Conſideration.

By the 43 *Eliz. c.* 2. *p.* 19. it is enacted, "That if in any Action of "Treſpaſs for any Thing done by "Virtue of this Statute, the Defen- "dant plead Not Guilty or Juſtify, "and the Iſſue joined in the Action "be found for the Defendant, or "the Plaintiff be nonſuited af- "ter Appearance, the Defendant "ſhall recover treble Damages, to "be aſſeſſed by the ſame Jury, or "upon a Writ of Enquiry, as the "ſame ſhall require."

CHAP.

CHAP. XVIII.

Of Damages in an Indictment or Information.

AS an Indictment and Information are both criminal Actions, Damages are not, for the Reaſons which have been in another Place mentioned, recoverable at the Common Law in either of them. Ante P. 2.

If Damages are given by a Statute to the Perſon aggrieved by a Crime, they are not recoverable in an Indictment for the Crime; unleſs it be expreſsly provided that they may be recovered in ſuch Indictment. 2 Hawk. 210.

By the 31 *Eliz. c.* 11. *p.* 3. it is enacted, " That if the Perſon indicted

" dicted of forcible Entry, or of " holding with Force, hath had the " Occupation or been in quiet Poſ- " ſeſſion of the Premiſſes, by the " Space of three whole Years toge- " ther before the Day of finding the " Indictment, he may alledge this in " Stay of Reſtitution, and Reſtitu- " tion to ſtay until that be tried if " the other Party will traverſe the " ſame; and if the Allegation be " found againſt the Perſon indicted, " then he to pay ſuch Damages as " ſhall be aſſeſſed by the Judge or " Juſtices before whom the ſame " ſhall be tried."

Lord Raym. 1036 Reg. v. Good-enough.

It has been holden, that an Inquiſition of forcible Entry taken before a Juſtice of the Peace is within the meaning of this Statute.

The Court of *King's Bench* does frequently give the Perſon who has pleaded Guilty to or been convicted upon

upon an Indictment for a Crime, which has been principally injurious to a private Perſon, Leave to go before the Maſter, in order to make a Satisfaction to the private Perſon; which being made a ſmall Fine is uſually ſet.

Other Courts do frequently ſet a ſmall Fine upon the Perſon, who has pleaded Guilty to, or been convicted upon an Indictment for a Crime which has been principally injurious to a private Perſon; in Caſe it appear by a Releaſe from the private Perſon, that a Satisfaction has been made to him.

CHAP.

CHAP. XIX.

Of Damages in an Action of Error.

NO Damages are recoverable at the common Law in an Action of Error.

By the 3 *H.* 7. *c.* 10. it is enacted, "That if any Defendant or Tenant, "or any other who ſhall be bound "by any Judgment, ſue afore Exe- "cution had any Writ of Error to "reverſe ſuch Judgment, in Delay "of Execution; that if the ſame "be affirmed, or the ſaid Writ be "diſcontinued, or any Perſon that "ſueth a Writ of Error be non- "ſuited in the ſame, the Perſon "againſt whom it is ſued ſhall re- "cover

" cover his Damages for the Delay " and wrongful Vexation, by Dif- " cretion of the Juſtices afore " whom the ſaid Writ of Error is " ſued."

No Damages are recoverable under this Statute in an Action of Error commenced after Execution; Damages being thereby only given, where a Writ of Error has been ſued out afore Execution in Delay thereof. Cro. Ja. 636. Eardley v. Turnock.

As the 27 *Eliz. c.* 8. by which an Action of Error in the *Exchequer Chamber* is given, is ſilent as to Damages, it was very ſoon after the making of that Statute doubted, whether Damages are recoverable in an Action of Error brought in the *Exchequer Chamber*. Cro. Eliz. 588. Penruddock v. Erington, Mich. 39 Eliz.

In a Modern Caſe it is admitted, that Damages are not recoverable in an 10 Mod. 278. Holroi v. Ebinſon, Hil. 1 G. 1.

an Action of Error brought in the *Exchequer Chamber.*

Dyer 77. Heuſlowe's Caſe, Mich. 6 E. 6.

It is laid down in one Caſe, that if an Action of Error be brought upon a Judgment in an Action of *Quare impedit*, and the Judgment be affirmed, the Defendant ſhall recover Damages, notwithſtanding Damages were not recoverable in the original Action.

Cro. Eliz. 617. Graves v. Short, Hil. 40 Eliz.

In another Caſe it is laid down, that as Damages are given by the 3 *H.* 7. *c.* 10. on Account of the Delay of Execution, if an Action of Error be brought upon a Judgment in an Action of *Formedon*, and the Judgment be affirmed, the Defendant is intitled to Damages, notwithſtanding Damages were not recoverable in the original Action.

Cro Eliz. 659. Penruddock v. Clark, 5 Rep. 101. S. C.

In another Caſe it is laid down, that the Defendant in an Action of Error

Error, brought upon a Judgment in an Action of *Quod permittat*, may recover Damages in Caſe the Judgment be affirmed, although no Damages were recoverable in the original Action; for that Damages may be recovered in every Caſe, wherein an Action of Error is brought before Execution.

The ſame Doctrine is laid in two other Caſes, in which Actions of Error were brought upon Judgments in Actions of *Quare Impedit*; and in the former of theſe the Authority of *Henſlowe's* Caſe, *Dyer* 77. is expreſsly recognized. Cro. Car. 145. Anon. Mich. 4 Car. 1. Cro. Car. 175. Boſtock's Caſe, Mich. 5 Car. 1.

The Contrary of what is laid down in theſe Caſes has however been holden in divers ſubſequent Caſes.

An Action of Error being brought upon a Judgment in an Action of Cro Car. 425. Smith v. Smith, Mich. 10 Car. 1.

Formedon, wherein the Judgment was affirmed, it was holden, that the Defendant could not recover Damages; and *per cur.* As no Damages were recoverable in the original Action, the Delay of Execution occaſioned by the Action of Error is only as to the Land; for which Reaſon the Defendant is not intitled to Damages under the 3 *H.* 7. *c.* 10.

1 Lev. 146. Winne v. Lloyd, Mich. 16 Car. 2.

In an Action of Error, wherein the Judgment in the original Action was affirmed, it was upon the Authority of *Smith and Smith*, *Cro. Car.* 425. holden that the Defendant was not intitled to Damages: becauſe no Damages were recoverable in the original Action.

1 Ventr. 166. Anon. Mich. 23 Car. 2.

An Adminiſtrator brought an Action of Error upon a Judgment againſt his Teſtator, and the Judgment was affirmed. It was holden, that

that the Defendant was not intitled to Damages.

An Action of Error was brought by an Adminiſtrator, upon a Judgment againſt himſelf as Adminiſtrator, and the Judgment was affirmed. It was holden, that the Defendant was not intitled to Damages; becauſe the Adminiſtrator was not liable to any Damages in the original Action. 4 Mod. 245. Gale v. Till. Mich. 5 W. and M. Carth. 261. S. C.

An Action of Error being brought by an Executor upon a Judgment againſt his Teſtator, wherein the Judgment was affirmed, it was holden, that the Defendant was not intitled to Damages. Str. 1072. Saltern v. Wynne, Eaſt. 10 G. 2.

But in two other Caſes, one of which is ſubſequent to all the Caſes laſt cited, the Doctrine of the old Caſes is recognized.

Str. 931. Fiſh. of Lond. v. Mercers Comp. Hil. 5 G. 2.

An Action of Error being brought upon a Judgment in an Action of *Quare Impedit*, and the Judgment being affirmed, a Queſtion aroſe concerning the *Quantum* of Damages the Defendant ought to recover: But it is in this Caſe admitted, that he ought to recover Damages.

Str. 1084. Ferguſon v. Rawlinſon. Hil. 11 G. 2.

An Action of Error being brought upon a Judgment in an Action upon the Statute of Uſury, and the Judgment being affirmed, a Queſtion aroſe whether, as Damages were not recoverable in the original Action, the Defendant could recover Damages, it was holden that he could, and *per Cur.* He is intitled to Damages by the expreſs Words of the 3 *H.* 7. *c.* 10. by which Damages are given where a Writ of Error has been ſued out in Delay of Execution, and the Judgment is affirmed.

In

In an Action of *Quare Impedit*, wherein the Value of the Church was found to be eighty Pounds a Year, there was Judgment for the Plaintiff. An Action of Error being brought, and the Judgment being affirmed, it was holden, that the Defendant ſhould have Damages for the Value of the Church pending the Action of Error. Cro. Car. 145. Anon. Mich. 4 Car. 1.

But it was holden in a modern Caſe, that in an Action of Error brought upon a Judgment in an Action of *Quare Impedit*, the Defendant cannot recover Damages for the Value of the Church pending the Action of Error; and *per Cur.* The Caſe in *Cro. Car.* 145. which has been relied on is a very ſtrange one, and could not have been well conſidered: It being very unreaſonable, that the Defendant ſhould in this Caſe recover Damages for the Value Str. 931. Biſh. of Lond. v. Mercers Comp. Hil. 5 G. 2.

of the Church pending the Action of Error; in as much as he has not ſuſtained a Loſs equal to that Value from the Delay thereby occaſioned; for if this Action had not been brought, the Preſentee would have had the Profits of the Church.

10 Mod. 278. Holroi v. Ebinſor, Hil. 1 G. 1.

In an Action of *Aſſumpſit* brought in the Court of *Common Pleas*, there was a Verdict for the Plaintiff with Four Hundred Pounds Damages, and Judgment was entered up for the Damages. The Judgment being affirmed by the Court of *King's Bench* in an Action of Error, a Queſtion aroſe, whether the Defendant could recover Damages for the Intereſt of the Four Hundred Pounds pending the Action of Error; it was holden that he could not: But the Opinion of the Court ſeems to have been founded upon the Practice of the Court of *Exchequer Chamber*, in which Court

Court Damages are never allowed in an Action of Error; for it was ſaid by *Parker* Ch. J. that if it had been *Res integra* he ſhould have been of Opinion, that Damages ought to be recovered for the Intereſt of the Four Hundred Pounds pending the Action of Error.

It is probable, that if the Court of *King's Bench* had recollected what is ſaid in the Caſe of *Penruddock* v. *Errington*, *Cro. Eliz.* 588. namely, that the Court did in that Caſe doubt whether Damages are recoverable in an Action of Error in the *Exchequer Chamber*, becauſe the 27 *Eliz. c.* 8. by which this Action is given, does not give Damages therein, they would not in this Caſe, which was an Action of Error at the Common Law, have thought it neceſſary, to adhere to the Practice of the Court of *Exchequer Chamber* in an Action of Error given by the 27 *Eliz. c.* 8.

It

It has moreover been holden in a ſubſequent Caſe, that Damages are recoverable in an Action of Error at the Common Law, for the Intereſt of the Money for which there is Judgment in the original Action.

Stra. 931. Biſhop of London v. Mercers Comp. Hil. 5 G.

In an Action of *Quare Impedit* there was Judgment that the Plainti ſhould recover Seventy Pounds Damages. An Action of Error being brought, and the Judgment being affirmed, it was holden, that the Defendant ſhould recover Damages for the Intereſt of the Seventy Pounds pending the Writ of Error.

CHAP.

CHAP. XX.

Of Damages where there is Judgment by Default.

IT is in divers Caſes ſaid, that where there is Judgment by Default the Juſtices may award Damages without a Writ of Enquiry. Bro. Dam. Pl. 55. Pl. 56. Pl. 68. Pl 194.

But whatever the Power of the Juſtices may be, it appears from the following Caſes, that they have for many Years paſt conſtantly awarded a Writ of Enquiry in ſuch Caſe, unleſs the Damages were certain.

In an Action of *Replevin*, wherein the Defendant had avowed the taking of Cattle for Rent in Arrear, the Plaintiff was nonſuited. As 3 Leon. 21 3. Ognell's Caſe, Paſch. 30 Eliz.

the

the Jury omitted to aſſeſs Damages for the Defendant, a Queſtion aroſe, whether Damages could be awarded by the Court without a Writ of Enquiry; it was holden that a Writ of Enquiry was not neceſſary; for that as the Damages were occaſioned by the Non-payment of the Rent, they were certain.

But it is in this Caſe ſaid, that if there had been a Verdict for the Plaintiff, and the Jury had omitted to aſſeſs Damages, a Writ of Enquiry ought to have been awarded; becauſe the Damages, which would in that Caſe have depended upon the Value of Cattle and the Circumſtances which attended the taking of them, would have been uncertain.

Cro. Eliz. 536. Bagſhaw v. Playn, Mich. 37 Eliz.

In an Action of Debt for foreign Money, which was averred to be of a certain Value, there was a Verdict for

for the Plaintiff; but no Damages were aſſeſſed. It was holden, that a Writ of Enquiry ought to be awarded; and *per cur.* The Value of foreign Money is no more known to the Juſtices than the Value of twenty Quarters of Wheat would be.

But it is in this Caſe ſaid, that if the Action had been for Money current, the Juſtices might have awarded Damages without a Writ of Enquiry, the Value of Money current being known to them.

It is in one Caſe ſaid, that if there be Judgment by Default in an Action of Debt, it is uſual for the Court to award Damages for the Detention of the Debt without a Writ of Enquiry. 2 Saund. 207. Holdip v. Otway, Trin. 21 Car. 2.

But it is in this Caſe ſaid, that the Court will never do this without the Aſſent of the Plaintiff; for that if he

he does not aſſent thereto a Writ of Enquiry ought to be awarded.

Sid. 442. Roe v. Apſley, Hil. 21 Car. 2. An Action of Debt being brought upon a Judgment in an Action of Debt upon a Bond, and there being Judgment by Default, the Court was moved to award Damages, namely, Intereſt for the Money due upon the Judgment in the Action of Debt upon the Bond, without a Writ of Enquiry. The Chief Juſtice was at firſt of Opinion, that a Writ of Enquiry ought to be awarded: But it was afterwards referred to the Prothonotary to aſſeſs Damages.

1 Ventr. 330. Anon. Trin. 30 Car. 2. It is in another Caſe ſaid, that if there be Judgment by Default in an Action of Debt, the Court, as the Demand is certain, does ſometimes award Damages without a Writ of Enquiry.

But it is in this Caſe ſaid, that the Court never does this in an Action of Treſ-

Treſpaſs, or in an Action upon the Caſe; becauſe theſe two Actions lie wholly in Damages.

If in an Action of Treſpaſs againſt two, who have both pleaded, one of the Defendants do afterwards make Default, a Writ of Enquiry ought, in order to prevent a Diſcontinuance, to be awarded as to him; but it is not neceſſary to execute it, before the Iſſue joined as to the other Defendant has been tried; becauſe, if there ſhould be a Verdict for the Plaintiff, the Defendants will be both liable to the Damages aſſeſſed, and if there ſhould be a Verdict for the Defendant, the Writ of Enquiry may, notwithſtanding this, be executed for aſſeſſing Damages againſt the Defendant who made Default. Bro. Diſcont. of Proceſs Pl. 25.

CHAP. XXI.

Of Damages where there is a Confeſſion as to the Whole or Part of the Action.

1 Rol. Abr. 578. Pl. 6. AN Action of Debt being brought for withdrawing Suit from a Mill, wherein Damages were alledged to the Amount of Forty Pounds, the Defendant confeſſed the Action. It was holden, that a Writ of Enquiry was not in this Caſe neceſſary, becauſe the Plaintiff had, by confeſſing the Action, admitted the Damages to be as alledged.

Bro Dam. Pl. 25. In an Action of Debt for Money due upon a Bond and for Money lent, wherein the Defendant confeſſed the Action as to the Money due upon the Bond, and pleaded to Iſſue as to the Money lent; the Plaintiff prayed Judg-

Judgment as to the Money due upon the Bond. It was holden, that he was not intitled to Judgment as to this until the Iſſue was tried. At the Trial of the Iſſue the Plaintiff was nonſuited; yet Judgment was at the Day in Bank given for him as to the Money due upon the Bond; and it is ſaid that he might have had Judgment as to this before, if he had entered a *Remittitur* as to the Money lent.

Three Breaches of Covenant being aſſigned in an Action of Covenant, the Defendant confeſſed the Action as to one of the Breaches, and pleaded to iſſue as to the other two. A *Venire facias* was awarded to try the Iſſues and to aſſeſs Damages as to the Breach confeſſed: A Verdict being found for the Plaintiff, the Jury aſſeſſed Damages as to the two Iſſues; but omitted to aſſeſs Damages as to the Breach confeſſed. A Writ of En- 1 Barn. 131. Townſhend v. Pool.

quiry was awarded for the aſſeſſing of Damages as to this Breach.

CHAP. XXII.

Of Damages where there is a Demurrer.

Bro. Dam. Pl. 194. IT is laid down, that if there be Judgment upon a Demurrer, the Juſtices may award Damages without a Writ of Enquiry.

But whatever their Power may be, it is not at this Day uſual for the Juſtices to award Damages in ſuch Caſe without a Writ of Enquiry.

1 Rol. Abr. 578. Pl. 4. Pl. 5. In an Action of Treſpaſs for reſcuing a Diſtreſs, wherein Damages were

were alledged to a certain Amount, the Defendant by his Plea juſtified the Reſcous. Judgment being given for the Plaintiff upon a Demurrer to the Plea, it was holden that the Plaintiff was intitled to the Damages alledged; becauſe the Defendant did by his Plea confeſs the Treſpaſs, and did not deny the Damages to be as alledged.

If in an Action of Waſte the Defendant demur to the Declaration, and there be Judgment upon the Demurrer for the Plaintiff, a Writ of Enquiry ought to be awarded. 1 Rol. Abr. 578. Pl. 8.

If the Defendant demur to part of the Declaration, and plead to Iſſue as to the Reſidue, and Judgment be given for the Plaintiff upon the Demurrer before the Iſſue is tried, he may enter a *Nolle Proſequi* as to the Iſſue, and have a Writ of 12 Mod. 558. Anon.

Inquiry for aſſeſſing Damages upon the Judgment. But he cannot have a Writ of Inquiry until a *Nolle Proſequi* is entered; becauſe, unleſs he do by entering a *Nolle Proſequi* manifeſt a Determination not to try the Iſſue, Damages may be aſſeſſed upon the Judgment by the Jury who try the Iſſue.

8 Mod. 108. Flemming v. Parker.

There being two Counts in the Declaration, the Defendant demurred to one and pleaded to Iſſue as to the other. Judgment was given for the Plaintiff upon the Demurrer before the Iſſue was tried, and Damages were aſſeſſed upon a Writ of Inquiry. Upon a Motion in arreſt of final Judgment upon the Demurrer, the Queſtion was, whether the Writ of Enquiry for aſſeſſing Damages upon the Judgment, could be awarded before the Iſſue was tried or a *Nolle Proſequi* was as to that entred. It was holden, that the Writ

Writ of Enquiry was in this Caſe well awarded; becauſe the Plaintiff had entered a *Remittitur* as to Damages upon the Iſſue before it was awarded.

If the Defendant in an Action demur to part of the Declaration, and plead to Iſſue as to the *Reſidua*, or if in an Action againſt two, one of the Defendants demur to the whole Declaration, and the other plead to Iſſue as to the whole, the Iſſue ought to be firſt tried; becauſe if this be found for the Plaintiff, the Jury who try it may aſſeſs conditional Damages as to the Demurrer. Lutw. 875. Hodges v. Nicholas.

If Iſſue be joined upon a Demurrer to Evidence, the Jury may be diſcharged without finding a Verdict; but it is ſaid, that they may aſſeſs conditional Damages before they are diſcharged. Cro. Car. 143. Darroſe v. Newbott.

By

By the 17 *Car.* 2. *c.* 7. *p.* 3. it is enacted, "That if in any Action of "Replevin, depending in any of "the King's Courts at *Weſtminſter*, "Judgment be given upon a De-"murrer for the Avowant, or him "who maketh Conuſance for Rent, "the Court ſhall award a Writ to "enquire of the Value of the Diſ-"treſs, and upon the Return thereof "Judgment ſhall be given for the "Arrear of Rent, if the Goods or "Cattle diſtrained ſhall amount to "that Value, and in Caſe they ſhall "not amount to that Value, then "for ſo much as they ſhall amount "unto."

The Defendant in an Action of Replevin, for whom there is Judgment upon a Demurrer, is not intitled to the Judgment by this Statute directed to be given, unleſs he have avowed or made Conuſance for Rent, that

that being the only Caſe which is therein mentioned.

CHAP. XXIII.

Of Damages where the Plaintiff is nonſuited.

IT is in the general true, that if the Plaintiff be nonſuited the Defendant is not intitled to Damages.

By the 21 *H.* 8. *c.* 19. *p.* 3. it is enacted, " That every Avowant, " and every Perſon who makes " Avowry, Juſtification or Conuſance, as Bailiff or Servant, in any " *Replegiare* or Second Deliverance, " for Rents, Cuſtoms or Services,

" or

" or for Damage feaſant, or other " Rent, if the Plaintiff be nonſuited " ſhall recover Damages."

Comb. 11. Humfreys v. Miſdale.

It may be inferred from one Caſe, that if the Defendant in an Action of *Replevin* avow for Damage feaſant, and the Plaintiff at the Trial of the Cauſe be nonſuited, the Jury impanelled to try the Cauſe may aſſeſs Damages for the Defendant

5 Mod. 76. Gardner v. Hobbs.

It is in another Caſe ſaid to be every Day's Practice for the Jury impanelled to try the Cauſe, to aſſeſs Damages for the Defendant, in an Action of *Replevin*, in Caſe the Plaintiff be nonſuited.

By the 43 *Eliz. c.* 2. *p.* 19. it is enacted, " That if in any Action of " Treſpaſs, or other Suit brought for " taking a Diſtreſs or doing any " other Thing by Virtue of this " Statute, the Defendant plead Not " guilty,

" guilty, or make Avowry, Conu-
" ſance or Juſtification, and the
" Plaintiff be nonſuited after Ap-
" pearance or at the Trial of the
" Cauſe, the Defendant ſhall recover
" treble Damages, to be aſſeſſed by
" the Jury impanelled to try the
" Cauſe, or upon a Writ of Enquiry,
" as the ſame ſhall require."

In an Action of *Replevin*, wherein the Defendant avowed the taking as a Diſtreſs for Money due upon a Rate made purſuant to the 43 *Eliz. c.* 2. the Plaintiff was at the Trial of the Cauſe nonſuited. No Damage being aſſeſſed for the Defendant by the Jury impanelled to try the Cauſe, a Queſtion aroſe, whether a Writ of Enquiry could be awarded. It was holden that it could; and *per cur.* As it is by the 43 *Eliz. c.* 2. directed, that Damages ſhall in ſuch Caſe be aſſeſſed by the Jury impanelled to try the

Lord Raym. 59. Herbert v. Waters.

the Cauſe, or upon a Writ of Enquiry, as the ſame ſhall require, a Writ of Enquiry may be awarded.

5 Mod 76. Gardner' v. Hobbs. In an Action of Treſpaſs, wherein the Defendant juſtified the taking of Goods by Virtue of the 43 *Eliz. c.* 2. the Plaintiff was at the Trial of the Cauſe nonſuited. As the Jury impanelled to try the Cauſe did not aſſeſs Damages for the Defendant, a Writ of Enquiry was awarded.

By the 17 *Car.* 2. *c.* 7. *p.* 2. it is enacted, " That if the Plaintiff in " *Replevin* ſhall be nonſuit before Iſ- " ſue joined, in any Suit depending " in any of the King's Courts at " *Weſtminſter*, upon the Defendant's " making a Suggeſtion of the Ar- " rear of Rent, the Court ſhall " award a Writ to the Sheriff of the " County where the Diſtreſs was " taken, to enquire touching the " Sum in Arrear and the Value of " the

" the Goods or Cattle diſtrained,
" and upon the Return of the In-
" quiſition the Defendant ſhall have
" Judgment to recover the Arrear
" of Rent, in Caſe the Goods or
" Cattle diſtrained ſhall amount to
" that Value, and in Caſe they ſhall
" not amount to that Value, then ſo
" much as they ſhall amount unto:
" And in Caſe the Plaintiff ſhall be
" nonſuit after Iſſue joined, the Ju-
" rors impanelled to try the Iſſue
" ſhall enquire concerning the Sum
" in Arrear, and the Value of the
" Goods or Cattle diſtrained; and
" the Avowant or he who maketh
" Conuſance ſhall have Judgment
" for the Arrear of Rent, or for ſo
" much thereof as the Goods or
" Cattle amount unto."

In an Action of *Replevin*, wherein the Defendant avowed for Rent in Arrear, the Plaintiff was at the Trial of the Cauſe nonſuited: But 1 Sid. 380. Sheafe v. Culpeper.

the Jury impanelled to try the Cauſe did not aſſeſs Damages in the Manner that is by the 17 *Car.* 2. *c.* 7. directed. It was holden, that a Writ of Enquiry could not be awarded; and *per cur.* As the Words of that Statute are, that the Jury impanelled to try the Cauſe ſhall, in Caſe the Plaintiff be nonſuited, aſſeſs Damages, no other Jury can aſſeſs Damages.

CHAP.

CHAP. XXIV.

In what Caſes a Writ of Enquiry may be awarded, where the Jury who tried the Iſſue have omitted to aſſeſs Damages.

IT is laid down, that if the Jury who tried an Iſſue, have omitted to aſſeſs Damages, in a Caſe wherein if they had aſſeſſed exceſſive Damages an Action of Attaint would have lain, a *Venire facias de novo* may be awarded: But that a Writ of Enquiry cannot be awarded. 10 Rep. 119. 4 Leon. 245.

The Reaſon aſſigned why a Writ of Enquiry cannot in ſuch Caſe be awarded is, that if exceſſive Damages Bro. Abridg. pl. 7.

ſhould be aſſeſſed thereupon the Party aggrieved would be without Remedy; in as much as an Action of Attaint does not lie upon a Writ of Enquiry.

10 Rep. 119. Cheyney's Caſe.

It is in one Caſe laid down, that wherever it is the Duty of the Jury who try an Iſſue to aſſeſs Damages, as a Conſequence of or dependent upon the Iſſue, an Action of Attaint lies in Caſe they aſſeſs exceſſive Damages.

It would be extremely difficult, if poſſible, to reconcile what is laid down in this Caſe with what is laid down in divers other Caſes.

If Damages are given in a certain Action by Statute, in Caſe an Iſſue therein joined be found for a certain Party, and the Iſſue be found for that Party, the Damages appear to be as much the Conſequence of and dependent

dependent upon the Iſſue, as Damages recoverable at Common Law are.

If this be ſo, it ſeems to be as much the Duty of the Jury, who try an Iſſue to aſſeſs Damages in an Action wherein Damages are given by a Statute, as it is to aſſeſs Damages in an Action wherein Damages are recoverable at the Common Law. And yet it appears from divers Caſes, that if the Jury, who tried an Iſſue joined in an Action wherein Damages are given by a Statute, have omitted to aſſeſs Damages, a Writ of Enquiry may be awarded: Becauſe an Action of Attaint would not have lain, in Caſe they had aſſeſſed exceſſive Damages.

If the Jury, by whom an Iſſue joined in an Action of *Quare impedit* was tried, have omitted to aſſeſs the Dyer 135. Poyner v. Charlton.

Damages given by 2 *Weſt. c.* 5. a Writ of Enquiry may be awarded.

Clift Entr. 302. If the Jury, by whom an Iſſue joined in an Action of Dower, *unde Nihil habet* was tried, have omitted to aſſeſs the Damages given by the Statute of *Merton*, a Writ of Enquiry may be awarded.

Comb. 11. Humfreys v. Miſdale. If the Jury, by whom an Iſſue joined in an Action of *Replevin* was tried, have omitted to aſſeſs the Damages given by the 7 *H.* 8. *c.* 4. or the 25 *H.* 8. *c.* 19. a Writ of Enquiry may be awarded.

MS. Rep. Bennet v. Hart, Eaſt. 28 G. 2. in K. B. In an Action of Treſpaſs againſt an Overſeer of the Poor, on the Account of ſomething done by Virtue of the 43 *Eliz. c.* 2. a Verdict was found for the Defendant: But the Jury did not aſſeſs the treble Damages given by that Statute. A Writ of Enquiry was awarded, and by *Denniſon*

niſon J. if Judgment had been entered up the Application for a Writ of Enquiry would have been too late: But as it has not, the Court may award one. There muſt however be, as a Foundation for awarding the Writ of Enquiry, a Suggeſtion entered upon the *Poſtea*, that the Defendant was an Overſeer of the Poor, and that the Action was brought againſt him for a Thing done by Virtue of the 43 *Eliz. c.* 2.

It appears from divers Caſes, that if the Jury, who tried an Iſſue joined in an Action wherein Damages are recoverable at the Common Law, have omitted to aſſeſs Damages, a *Venire facias de novo* may be awarded, but a Writ of Enquiry cannot; becauſe an Action of Attaint would have lain in Caſe they had aſſeſſed exceſſive Damages.

If

10 Rep. 119. Cheyney's Caſe, Mich. 10 Ja. 1.

If the Jury, by whom an Iſſue joined in an Action of *Detinue* was tried, have omitted to aſſeſs Damages, a *Venire facias de novo* may be awarded, but a Writ of Enquiry cannot.

Lord Raym. 60. Herbert v. Waters. Mich. 7 W. 3.

It is in a ſubſequent Caſe ſaid by *Holt* C. J. that in the Caſe of *Burton* and *Robinſon* 17 *Car.* 2. in which the Jury who tried the Iſſue in an Action of *Detinue* had omitted to aſſeſs Damages, a writ of Enquiry was awarded; but he adds that the awarding of it was contrary to what is laid down in *Cheyney's* Caſe, and in his Opinion contrary to Law.

10 Rep. 119. Cheyney's Caſe.

If the Jury, by whom an Iſſue joined in an Action of Treſpaſs was tried, have omitted to aſſeſs Damages, a *Venire facias de novo* may be awarded, but a Writ of Enquiry cannot.

In

In an Action of *Aſſumpſit*, wherein the Defendant had pleaded a *Miſnomer* of his Chriſtian Name, Iſſue was joined upon the Plea, and a Verdict was found for the Plaintiff. M S. Rep. Eikhorn v. L'Maitre, East. 8 G. 3 in C. B.

No Damages being aſſeſſed by the Jury who tried the Iſſue, two Queſtions aroſe; Firſt, whether a *Reſpondeas ouſter* could be awarded; Secondly, whether if the Court ſhould be of Opinion that a *Reſpondeas ouſter* could not be awarded, a Writ of Enquiry could be awarded for ſupplying the Defect of the Verdict in not aſſeſſing Damages.

It was holden that a *Reſpondeas ouſter* could not be awarded; and by *Wilmot* Ch. J. it is laid down in divers Caſes, that if the Iſſue joined upon a Plea of *Miſnomer* be found for the

the Plaintiff the Verdict is peremptory.

It was likewiſe holden that a Writ of Enquiry could not be awarded, and by *Wilmot* Ch. J. As an Action of Attaint would have lain, in Caſe the Jury by whom the Iſſue was tried had aſſeſſed exceſſive Damages, a Writ of Enquiry cannot be awarded: For it is laid down in *Cheyney's* Caſe 10 *Rep.* 119, and the Doctrine of this Caſe is recogniſed in divers Caſes that if the Jury who tried an Iſſue have omitted to aſſeſs Damages, in a Caſe wherein an Action of Attaint would have lain if they had aſſeſſed exceſſive Damages, a Writ of Enquiry cannot be awarded. It has moreover been ſo conſtantly the Practice, where there has been a Verdict for the Plaintiff upon an Iſſue joined on a Plea of *Miſnomer*, for the Jury who tried it to aſſeſs Damages,

Damages, that no Inſtance has been produced, wherein a Writ of Enquiry was awarded after the Trial of the Iſſue.

A *Venire facias de novo* was awarded.

CHAP. XXV.

Of aſſeſſing Damages ſeverally againſt the ſame Defendant.

WHEREVER two or more Cauſes of Action are alledged againſt the ſame Defendant, and there is a general Verdict for the Plaintiff, Damages may be aſſeſſed ſeverally. 1 Rol. Abr. 570. Pl. 1.

And

Dyer 370. Moor 706. 10 Rep. 130. Cro. Eliz. 560. Cro. Ja. 115.

And it is the ſafer way to have Damages aſſeſſed ſeverally in every ſuch Caſe; for it is in the general true, that if entire Damages are aſſeſſed, and the Action do not lie as to one of the Cauſes alledged Judgment may be arreſted: Becauſe it muſt in the general be intended, that ſome Part of the Damages is aſſeſſed as to that Cauſe for which the Action does not lie.

Cro. Ja. 544. Heath v. Dauntley.

If in an Action of *Aſſumpſit*, wherein two promiſes are alledged, the Defendant plead *Non Aſſumpſit*, and there be a general Verdict for the Plaintiff, entire Damages may be aſſeſſed; becauſe the Plea extends to both promiſes.

Cro. Eliz. 537. Grimſton v. Reyner.

But it is in ſuch Caſe the ſafer Way to have Damages aſſeſſed as to each promiſe ſeverally; becauſe if they are ſo aſſeſſed the Plaintiff, in caſe

caſe the Action lies as to one of the Promiſes, will be entitled to Judgment as to that, although it do not lie as to the other.

The following Diſtinction may from divers Caſes be collected; that if the Words, for which an Action upon the Caſe is brought, were all ſpoken at the ſame Time, and there be a general Verdict for the Plaintiff with entire Damages, Judgment cannot be arreſted, in caſe any of the Words are actionable, although others of them are not actionable; for that it muſt in this Caſe be intended, that the whole Damages were aſſeſſed for the Words which are actionable: But that if the Words were ſpoken at different Times, and there be a Verdict for the Plaintiff with entire Damages, Judgment may be arreſted, in caſe all the Words ſpoken at any one Time are not actionable, Moor 141. Cro. Eliz. 329. Cro. Car. 327. 1 Sid. 38. 1 Rol. Abr. 576. Pl. 1. Pl. 2.

although ſome of the Words ſpoken at another Time are actionable; for that it muſt in this Caſe be intended, that ſome Part of the Damages was aſſeſſed for Words which are not actionable.

Rep. Ca. Pr. in C. B. 118. 1 Barn. 337, 340.

No notice is taken of this Diſtinction in divers other and more modern Caſes; it being in theſe laid down generally, that if in an Action upon the Caſe for Words, wherein different ſets of Words are alledged, there be a general Verdict for the Plaintiff with entire Damages, Judgment may be arreſted, in caſe all the Words in any one ſet are not actionable, although the Words in the other ſets are actionable; for that it muſt be intended, that ſome Part of the Damages was aſſeſſed for Words which are not actionable.

Cro. Car. 20 White v. Riſden.

In an Action upon the Caſe the Plaintiff alledged, that he delivered

to

to the Defendant a Gelding to ride upon from *London* to *Exeter*, which was to have been re-delivered by the Defendant to the Plaintiff at *Exeter*: But that the Defendant rode the Gelding from *London* to *Exeter*, and from *Exeter* to *London*, and by that riding ſo abuſed the Gelding that he became of little Value; and that notwithſtanding the Plaintiff did at *Exeter* require the Defendant to re-deliver the Gelding, he refuſed and ſtill doth refuſe to re-deliver him. A general Verdict being found for the Plaintiff with entire Damages, it was holden that the Plaintiff was intitled to Judgment; and *per Cur.* Although the not re-delivering the Gelding was the principal Tort, the abuſing of him afterwards was another Tort, and the Plaintiff may certainly recover Damages for both the Torts in the preſent Action. It has been ſaid, that if the Plaintiff can recover Damages for both the

Torts in the preſent Action, they ought not to have been both alledged in the ſame Count. If this ſhould be admitted, and it ſhould be further admitted, that the Declaration would have been bad upon a Demurrer for Duplicity, it by no means follows, that the Judgment ought to be arreſted. On the contrary as the Defendant did not Demur to the Declaration, but pleaded Not guilty, and there is a Verdict againſt him, the Plaintiff is intitled to Judgment.

1 Saund. 155. Eccleſtone v. Clipton.

In an Action of Covenant, wherein four Breaches of Covenant were aſſigned, there was Judgment by Default, and entire Damages were aſſeſſed upon a Writ of Enquiry: Upon a Motion in Arreſt of final Judgment, it appeared, that the Action did not lie as to one of the Breaches, and the Judgment was for that Reaſon arreſted.

If

If in an Action of Debt, wherein two Contracts are alledged, there be a general Verdict for the Plaintiff, it is the ſafer Way to have Damages aſſeſſed as to each Contract ſeverally; for if entire Damages are aſſeſſed, and the Action do not lie as to one of the Contracts, Judgment may be arreſted. 1 Brownl. 70. Mortimer v. Freeman.

If in an Action of *Detinue*, wherein the Detaining of two Chattels is alledged, there be a general Verdict for the Plaintiff, Damages ought to be aſſeſſed as to each Chattel ſeverally: Otherwiſe as the Plaintiff, in caſe either of the Things cannot be delivered to him by the Sheriff, is entitled to Damages to the Value thereof, there muſt be a Writ of Enquiry for the aſſeſſing of Damages. Bro. Detinue de Biens. Pl. 4. Ante Page 70.

Cro. Eliz. 59. Aſh v. Wood. If the Plaintiff in an Action of Replevin declare in the *Detinet*, in which caſe Damages may be recovered for the detaining of the Thing diſtrained as well as for the taking thereof, and there be a general Verdict for the Plaintiff, Damages ought to be aſſeſſed ſeverally; for if they are not ſo aſſeſſed Judgment may be arreſted, in caſe either the taking or the detaining be not well alledged.

3 Leon. 213. Hitchcock v. Harvey. In an Action of Treſpaſs, wherein the Plaintiff had declared for the breaking of his Cloſe and the ſpoiling of his Graſs, there was a general Verdict for him with entire Damages: But the Judgment was arreſted; it appearing that the Action did not lie as to the breaking of the Cloſe.

In

In an Action of Treſpaſs, wherein a Breaking of the Plaintiff's Cloſe, and a Beating of his Servant were alledged, there was a general Verdict for the Plaintiff with entire Damages. Judgment was arreſted; and *per Cur.* As a Maſter cannot recover Damages for the Beating of his Servant, unleſs it be alledged that by Reaſon of the Beating he loſt the Service of the Servant, and that is not alledged in the preſent Caſe, the Plaintiff is not entitled to Judgment; for it muſt be intended that ſome Part of the Damages was aſſeſſed for the Beating of the Servant. 10 Rep. 130. Poley v. Oſborn.

In an Action of Treſpaſs, wherein an Aſſault, Battery and Wounding were alledged, the Defendant pleaded Not guilty as to the Battery and Wounding, and a Juſtification as to the Aſſault. A general Verdict was found for the Plaintiff, and the Jury aſſeſſed Cro. Ja. 251. Candiſh's Caſe.

assessed Six-pence Damages as to the Battery and Wounding, and one Penny as to the Assault. The Judgment entered upon the Verdict was reversed in an Action of Error; and *per Cur.* The Jury ought not to have assessed Damages severally as to the Assault; because this is included in the Battery and Wounding, and if this be so, they have assessed double Damages for the same Thing, which they had no Power to do.

1 Rol. Abr. 570. Pl. 2. If in an Action of Trover, wherein the Conversion of two Chattels is alledged, there be a general Verdict for the Plaintiff, it is the safer Way to have Damages assessed as to each Chattel severally; for if entire Damages are assessed by the Jury, and the Action do not lie as to one of the Chattels, Judgment may be arrested.

By

By a Rule of the Court of *Common Pleas* of *Michaelmas* Term 1764 it is provided, "That where a Verdict "finds entire Damages, where Da- "mages are the Principal and Part "is not actionable, although Judg- "ment be arrested, a *Venire facias* "*de Novo* may by Rule of Court "iſſue as upon an ill Verdict, and "upon the new Trial the Party may "ſever his Damages".

A *Venire facias de Novo* has purſuant to this Rule been frequently awarded in Actions upon the Caſe for Words. Rep. Ca. Pr. in C. B. 118. 1 Barn. 337, 340.

However true it may in the general be, that if two Cauſes of Action are alledged, and there is a general Verdict for the Plaintiff with entire Damages, Judgment may be arreſted, in Caſe the Action do not lie as to one of the Cauſes, there are ſome Caſes,

Caſes, in which Judgment cannot be arreſted, notwithſtanding two Cauſes of Action are alledged, and the Action do not lie as to one of them.

1 Rol. Abr. 577. Pl. 5. Pl. 6. If in an Action of *Aſſumpſit*, wherein two promiſes are alledged, one of them be inſenſible, and there is a general Verdict for the Plaintiff with entire Damages, Judgment cannot be arreſted; becauſe it is not to be intended, that any Part of the Damages was aſſeſſed as to the Promiſe which is inſenſible.

Carth. 230. Bridges v. Horner. In an Action of Treſpaſs the Plaintiff declared for erecting a Wall upon his Soil, on the ſecond Day of *April* in one Year, with a *Continuando* from the twentieth Day of *February* in the preceding Year to the Day of exhibiting the Bill. A general Verdict being found for the Plaintiff with entire Damages, it was upon

upon a Motion in Arreſt of Judgment inſiſted, that the Verdict is bad; becauſe the Jury have aſſeſſed Damages for a Continuance of the Treſpaſs before the Treſpaſs was committed. The Verdict was holden to be good; and *per cur.* As that Part of the Declaration which alledges a Continuance of the Treſpaſs is inſenſible, and conſequently void, it is not to be intended, that any Part of the Damages was aſſeſſed for the Continuance of the Treſpaſs.

It is in one Caſe laid down, that if two Promiſes are alledged in an Action of *Aſſumpſit*, one of which is impoſſible to be performed, and there be a general Verdict for the Plaintiff with entire Damages, Judgment cannot be arreſted; becauſe it is not to be intended, that any Part of the Damages was aſſeſſed as to the Promiſe which is impoſſible to be performed. 1 Rol. Abr. 577. Pl. 5.

A Diſ-

1 Freim. 83. Nichols v. Reeve.

A Diſtinction is taken by *Vaughan* Ch. J. between a legal Impoſſibility of performing a Promiſe and a natural one; and it may from what is ſaid by him in this Caſe be inferred, that if two Promiſes are alledged in an Action of *Aſſumpſit*, the Performance of one of which is legally impoſſible, and there be a general Verdict for the Plaintiff with entire Damages, Judgment may be arreſted; becauſe, as it is not to be preſumed that the Jury were conuſant of what amounted to a legal Impoſſibility of performing a Promiſe, it is to be intended, that ſome Part of the Damages was aſſeſſed as to the Promiſe which is legally impoſſible to be performed: But that if the Performance of one of the Promiſes be naturally impoſſible, Judgment cannot be arreſted; becauſe it is not to be intended, that any Part of the Damages was aſſeſſed as to this Promiſe.

In

In an Action of Treſpaſs the Plaintiff declared for the cutting of his Graſs on the twentieth Day of *Auguſt* in one Year, with a *Continuando* to the thirtieth Day of *September* in the next Year. A general Verdict being found for the Plaintiff with entire Damages, the Queſtion was, whether Judgment ought to be arreſted. It was holden that it ought not; and *per cur.* Where the doing of a Thing is alledged which was naturally impoſſible to be done, as the continuing to cut the Graſs in this Caſe certainly was, it is not to be intended, that any Part of the Damages was aſſeſſed as to ſuch Thing. 1 Freem. 83. Nichols v. Reeve.

CHAP. XXVI.

Of aſſeſſing Damages ſeverally againſt different Defendants.

Str. 79. Lane v. Santiloe and another, Hil. 4 G. 1.

IN an Action upon the Caſe againſt two for a malicious Proſecution of the Plaintiff for Felony, the Jury aſſeſſed Twenty Pounds Damages againſt one of the Defendants, a Juſtice of the Peace who had committed the Plaintiff, and Two Hundred Pounds againſt the other who had proſecuted the Plaintiff; and *King* Ch.

Ch. J. before whom the Cauſe was tried, directed the Verdict to be taken in this Manner.

In an Action upon the Caſe againſt four for a malicious Proſecution, the Jury would have aſſeſſed Eight Hundred Pounds Damages againſt one of the Defendants, and One Hundred againſt each of the other three: But *Raymond* Ch. J. before whom the Cauſe was tried, being of Opinion that the Damages could not be aſſeſſed ſeverally, the Jury found a general Verdict with Eleven Hundred Pounds Damages. Str. 910. Lowfield v. Bancroft and others, Trin. 5 G. 2.

An Action of Debt upon a Bond being brought againſt two by ſeveral *Præcipes*, it was holden that the Damages muſt be aſſeſſed ſeverally, for that if this was not done, the Judgment would not agree with the Writs. But it was likewiſe Bro. Sev. Præcip. Pl. 8.

wiſe holden, that the Plaintiff could take out Execution againſt only one of the Defendants.

Bro. Dam. Pl. 91. In an Action of Maintenance againſt two, wherein one of the Defendants pleaded Not guilty, the other a Juſtification, there was a general Verdict for the Plaintiff with entire Damages. It was holden, that Damages ought to have been aſſeſſed ſeverally; for that the Torts in the Caſe of Maintenance muſt always be ſeveral.

Bulſt. 157. Sampſon v. Gideon and another, Trin. 9 Ja. 1. It is in one Caſe laid down, that if in an Action of Treſpaſs for a Battery againſt two, wherein both the Defendants have joined in the Plea of Not guilty, there be a general Verdict for the Plaintiff, Damages ought to be aſſeſſed ſeverally; for that as the Stroke of one of the Defendants could never be the Stroke of

of the other, the Battery could not be a joint Act.

But it may be inferred from divers Caſes, both prior and ſubſequent thereto, that this Caſe is not Law.

In an Action of Treſpaſs againſt two for cutting down Trees, wherein the Defendants had pleaded different Pleas, they were both found Guilty. It was holden that entire Damages ought to be aſſeſſed, for that although the Pleas are ſeveral it is but one Treſpaſs. Bro. Dam. Pl. 202.

In an Action of Treſpaſs for an Aſſault and Battery againſt three, two of the Defendants pleaded *Son Aſſault Demeſne*, the other Not guilty. The Iſſues joined upon both Pleas were found for the Plaintiff; but Damages were aſſeſſed as to each Iſſue ſeverally. The Verdict was holden to be bad; and *per cur.* As the Cro. Eliz. 860. Auſten v. Willward and others, Hill. 43 Eliz.

Treſpaſs is alledged to be a joint one, and the Defendants are found to have been equally Guilty, entire Damages ought to have been aſſeſſed.

11 Rep. 5. Heydon's Caſe, Trin. 10 Ja. 1.

It is in one Caſe laid down, that if in an Action of Treſpaſs brought againſt two for a Battery and Wounding, there be a general Verdict for the Plaintiff, and Damages are aſſeſſed ſeverally, the Verdict is bad, notwithſtanding that much the greater Part of the Injury was done by one of the Defendants; for that the Act of one of the Defendants is to be conſidered as the Act of both; and it makes no Difference in ſuch Caſe, whether the Defendants have joined in the ſame Plea, or have pleaded different Pleas.

11 Rep. 5. Heydon's Caſe, Trin. 10 Ja. 1.

In an Action of Treſpaſs againſt two for an Aſſault, Battery and Wounding, one of the Defendants pleaded Not guilty as to the Wounding,

ing, and juſtified as to the Reſidue; the other juſtified as to the whole. The Iſſue joined upon the Plea of the former Defendant was found for the Plaintiff, and Damages to the amount of Twenty Pounds were aſſeſſed thereupon. The Iſſue joined upon the Plea of the latter Defendant was likewiſe found for the Plaintiff, and Damages to the Amount of One Hundred Pounds were aſſeſſed thereupon. Judgment being entered up for the ſeveral Damages, it was reverſed in an Action of Error; and *per cur.* As this Action was brought for a joint Treſpaſs, and both the Defendants are found Guilty, the Jury ought to have aſſeſſed Damages jointly againſt both, notwithſtanding the Defendants have ſevered in their Pleas. The Miſtake of the Jury, in aſſeſſing Damages ſeverally, might have been cured by entering up Judgment againſt only one of the Defendants;

dants; but as this is not done the Judgment is bad.

Str. 422. Onſlow v. Orchard and another, East. 7 G. 1.

In an Action of Treſpaſs againſt *A.* and *B.* for an Aſſault, Battery, falſe Impriſonment, and taking Goods, *A.* pleaded Not guilty to the whole Treſpaſs, *B.* pleaded *Son Aſſault Demeſne* as to the Aſſault, but made no Anſwer as to the Reſidue of the Treſpaſs. Iſſues being joined upon both Pleas, there was a general Verdict for the Plaintiff with entire Damages. Upon a Motion in Arreſt of Judgment it was inſiſted, that Damages ought to have been aſſeſſed ſeverally; for that as *B.* was only found Guilty of the Aſſault, this being the only Thing in Iſſue as to him, the ſame Damages ought not to be aſſeſſed againſt him as againſt *A.* who was found Guilty of the whole Treſpaſs. It was holden that Judgment ought not to be arreſted; and *per cur.* As the whole Treſpaſs is charged to have been

been committed at the ſame Time, and by both the Defendants, and there is a general Verdict for the Plaintiff, they are both liable to the ſame Damages.

In an Action of Treſpaſs againſt two, wherein there was Judgment againſt both by Default, Twenty Pounds Damages were aſſeſſed upon a Writ of Enquiry againſt one of the Defendants, and only one Penny againſt the other. The Judgment was arreſted upon the Authority of *Heydon's* Caſe, wherein it is laid down, that if the Treſpaſs be confeſſed by two Defendants Damages cannot be aſſeſſed ſeverally. 3 Lev. 324. Smithſon v. Garth, Hill. 3 W. and M.

In an Action of Treſpaſs againſt *Houſe*, *Slater* and *Goodacre*, for taking Goods and a falſe Impriſonment, there was Judgment by default againſt *Houſe*, *Slater* demurred, *Goodacre* pleaded Not Guilty. The Iſſue Stra. 1140. Chapman v. Houſe, Slater and Goodacre, Trin. 13 G. 2.

Iſſue joined upon the Plea of *Goodacre* being found for him, the Jury who tried this proceeded to aſſeſs abſolute Damages againſt *Houſe*, and contingent ones againſt *Slater*. A Queſtion ariſing, whether the Jury could aſſeſs greater Damages againſt one of theſe than againſt the other, *Lee* Ch. J. before whom the Cauſe was tried, was of Opinion that as the Defendants had not joined in a Plea, the Jury might do this, and Damages to the Amount of a Hundred Pounds were aſſeſſed againſt *Slater*, and only One Shilling Damages againſt *Houſe*.

This Opinion is not reconcileable with what is laid down in divers of the Caſes which have been cited, namely, that wherever two Defendants in an Action of Treſpaſs are equally Guilty, greater Damages cannot be aſſeſſed againſt one of them than againſt the other.

If

If in an Action of Treſpaſs againſt two, one of the Defendants be found Guilty at one Time, and the other at another Time, Damages ought to be aſſeſſed ſeverally. 11 Rep. 6. Brownl. 233.

In an Action of Treſpaſs againſt *A.* and *B.* for beating a Servant of the Plaintiff, whereby he loſt the Service of the Servant, and for taking the Goods of the Plaintiff, both the Defendants were found Guilty of the taking of the Goods; and *A.* was found Guilty of the Battery; But as to this *B.* was found Not guilty Ten Shillings Damages were aſſeſſed againſt *A.* for the Loſs of Service, and Five Shillings againſt both the Defendants for the taking of the Goods. The Judgment was, that the Damages of Ten Shillings ſhould be recovered againſt *A.* and the Damages of Five Shillings againſt both the Defendants, and that the Plain- Bro. Dam. Pl. 107.

Plaintiff ſhould be amerced for his falſe Clamour as to *B.* in alledging that he was guilty of the Battery.

The Book is ſilent as to that Matter; but it is probable that the beating of the Servant and the taking of the Goods were at different Times; otherwiſe this Caſe is not reconcileable with divers which have been before recited.

Cro. Eliz. 860. Auſten v. Willward and another, Hill. 43 Eliz.

It is laid down in one Caſe, that Damages ought to be aſſeſſed ſeverally, in an Action of Treſpaſs againſt two, in Caſe one of the Defendants be found Guilty of Part of the Treſpaſs, and the other of the whole thereof.

11 Rep. 7. Heydon's Caſe, Trin. 10 Jac. 1.

The ſame is laid down in a ſubſequent Caſe.

Sty. 5. Whitewell v. Short, Hil. 21 C. 1.

And it is in another ſubſequent Caſe ſaid, that in an Action of Treſpaſs againſt two, wherein one was found

found Guilty of Part of the Treſpaſs and the other of the whole thereof, Judgment was arreſted; becauſe Damages were aſſeſſed.

But theſe Caſes are not reconcileable with divers that have been before cited; unleſs it be ſuppoſed that the different Parts of the Treſpaſs were committed at different Times; it appearing clearly from theſe Caſes, that the Act of any one Party to a Treſpaſs is always to be conſidered as the Act of every Party thereto.

In an Action of Trover againſt two for the Converſion of two thouſand Loads of Coal, wherein the Defendants both joined in pleading Not guilty, one of them was found Guilty as to a certain Number of Loads, and Not guilty as to the Reſidue; and the other was found Guilty as to a certain Number of Loads, and Not guilty

Cro. Car. 54. Player v. Warn and Dawes.

guilty as to the Reſidue. Damages having been aſſeſſed ſeverally and Judgment having been entered up for the Damages aſſeſſed againſt both, it became a Queſtion in an Action of Error, whether Damages could be aſſeſſed ſeverally. It was holden that they might; and *per cur.* Notwithſtanding the Plaintiff has alledged a joint Converſion, the Jury had a Power to aſſeſs Damages againſt each Defendant ſeverally for the Number of Loads converted by him; and as they have exerciſed this Power, the Plaintiff is intitled to Judgment for the Damages aſſeſſed againſt both.

Cro Car. 192. Dodſworth v. Johns and Robinſon.

In an Appeal of *Mayhem* againſt two, who pleaded different Pleas, there was a general Verdict for the Plaintiff, with a Hundred Pounds Damages againſt one of the Defendants, and only Fifty Pounds againſt the other. Judgment being entered up againſt both for the Damages of a Hun-

Hundred Pounds, it became a Queſtion in an Action of Error whether Judgment could be entered up in this Manner, without having firſt entered a *Remittitur* as to the Fifty Pounds. It was holden that it might; and *per cur.* Although the Plaintiff could not recover the Damages aſſeſſed againſt both the Defendants, it was not neceſſary to enter a *Remittitur*, in as much as he has by entering up Judgment for the Damages of a Hundred Pounds waved his Right to the Damages of Fifty Pounds.

In an Action of Treſpaſs againſt *Biſhop* and another for an Aſſault and Battery, one of the Defendants pleaded Not guilty, the other a Juſtification. A general Verdict being found for the Plaintiff, whereby Damages were aſſeſſed ſeverally, the Plaintiff entered up Judgment againſt *Biſhop*: But before he did this he entered a *Nolle proſequi* as to the other. Cro. Car. 243. Walſh v. Biſhop and another. Hill. 6 Car. 1.

Defendant. An Action of Error being brought it was inſiſted; firſt, that the Jury had no power to aſſeſs Damages ſeverally; and ſecondly, that if they had a Power to do this, the entering of a *Nolle proſequi* as to one of the Defendants, which amounted to a Confeſſion that the Plaintiff had no Cauſe of Action againſt him, did operate as a Releaſe to him; the Conſequence of which will be, that as the *Nolle proſequi* was entered before Judgment was entered up againſt *Biſhop*, it was a Releaſe to him alſo. The Judgment was affirmed; and *per cur.* Damages ought not to have been aſſeſſed ſeverally: Yet as no Advantage is taken of their being ſo aſſeſſed; but on the contrary, the Plaintiff has, by entering a *Nolle proſequi*, given up his Right to the Damages aſſeſſed againſt one of the Defendants, the Miſtake of the Jury is immaterial. The entering of a *Nolle proſequi* as to one of the Defendants did

did not amount to a Confeſſion that the Plaintiff had no Cauſe of Action againſt him, nor did it operate as a Releaſe to him; it being nothing more than a Declaration that he will proceed no further againſt him. It appears from divers Caſes, that where two Defendants in an Action of Treſpaſs have pleaded different Pleas, the Plaintiff, in caſe both be found guilty, and Damages are aſſeſſed ſeverally, may enter a *Nolle proſequi* as to one of the Defendants, and enter up Judgment againſt the other.

In an Action of Treſpaſs againſt *Strode* and *Pemberton* for an Aſſault, Battery and falſe Impriſonment, and impoſing the Crime of Treaſon, wherein both the Defendants joined in the Plea of Not guilty, there was a general Verdict for the Plaintiff with a Thouſand Pounds Damages againſt *Strode*, and only Fifty Pounds againſt *Pemberton*. A *Nolle proſequi* Carth. 10. Rodney v. Strode and Pemberton, Mich 3 Ja. 2.

being entered as to *Pemberton*, it was upon a Motion in Arreſt of Judgment againſt *Strode* inſiſted, that the Caſe of *Walſh* v. *Biſhop* and another, *Cro. Car.* 243. wherein it was holden, that the Miſtake of the Jury in aſſeſſing Damages ſeverally was cured by entering a *Nolle proſequi* as to one of the Defendants, is very different from the preſent Caſe; the two Defendants having in that Caſe pleaded different Pleas. On the other Side it was inſiſted, that the Miſtake of the Jury in aſſeſſing Damages ſeverally againſt two Defendants in an Action of Treſpaſs, is in all Caſes cured by entering a *Nolle proſequi* as to one of them before Judgment is entered up againſt the other: For that, as the Perſon who brings an Action of Treſpaſs is not obliged to make all the Parties to the Treſpaſs Defendants, there is no Reaſon that he ſhould be obliged to proceed againſt all of them for the Damages aſſeſſed.

aſſeſſed. Judgment was given by the Court of *King's Bench* for the Plaintiff; and the Judgment was afterwards affirmed both in the *Exchequer Chamber* and in the *Houſe of Lords.*

CHAP. XXVII.

To what Time Damages may be aſſeſſed.

IF there be a Verdict for the Demandant in an Action of Entry *ſur Novel Diſſeiſin*, Damages can only be aſſeſſed to the Time of finding it; and if a Writ of Enquiry be awarded in ſuch Action, Damages can

10 Rep. 117. Pilford's Caſe. Bro. Dam. Pl. 14.

can only be aſſeſſed to the Time of awarding it.

10 Rep. 117. Pilford's Caſe.

It is ſaid, that in a *Præcipe quod reddat* of Rent, the Demandant may recover Damages to the Day that Judgment is given.

1 Leon. 56. Walker v. Nevil.

It has in one Caſe been holden, that Damages may be recovered, upon a Writ of Enquiry in an Action of Dower *unde Nihil habet* to the Time of the Inquiſition.

2 Barn. 291. Penrice v. Penrice.

It has in another Caſe been holden, that upon a Writ of Enquiry in an Action of Dower *unde Nihil habet*, Damages can only be recovered to the Time of awarding the Writ.

But this Caſe does not ſeem to be Law: It being expreſsly provided in the Statute of *Merton*, by which the Action of Dower *unde Nihil habet*

is

is given, "That a Widow ſhall "recover Damages in this Action "from the Time of the Death of "her huſband, unto the Day that "ſhe by Judgment of our Court "have recovered ſeiſin of her "Dower."

Damages are not recoverable in an Action of Waſte, for Waſte committed pending the Action. 2 Inſt. 304.

But Damages may be recovered in an Action of Eſtrepement, which is brought pending an Action of Waſte, for Waſte committed pending the Action of Waſte. Ibid.

In an Action of *Aſſumpſit* the Plaintiff declared upon a Promiſe made the 19th of *June* 1718, to pay for Neceſſaries provided for the Defendant's Son, and alledged that he had provided Neceſſaries for five Years and nine Months thence fol- Lord Raym. 1382. Baker v. Bache.

following. There being a Judgment by Default, the Jury upon a Writ of Enquiry, which was executed on the third Day of *February* 1723, aſſeſſed Damages generally, and final Judgment was given for the Plaintiff. An Action of Error being brought the Judgment was reverſed; becauſe Damages were aſſeſſed for neceſſaries provided, not only after the Action was commenced, but alſo after the Execution of the Writ of Enquiry; in as much as the five Years and nine Months, in Caſe the Months were to be computed as Calendar Months, did not expire until the 15th of *March* 1723, and in Caſe they were to be computed as lunar Months, not until the 25th of *February* 1723.

MS. Rep. Robinſon v. Bland, Mich 1 G. 3. in K. B.

In an Action of *Aſſumpſit*, upon a written Contract to pay a certain Sum of Money with Intereſt, it was holden, that Intereſt ſhould be computed

puted to the Time of the Judgment; and by Lord *Mansfield* Ch. J. An Action of *Assumpsit*, although it be nominally brought for Damages only, is in reality brought for a ſpecifick performance of the Contract. As a new Action cannot in this Caſe be brought for the Intereſt, which became due after the Commencement of the Action, if this cannot be recovered in the preſent Action the Plaintiff muſt loſe it; which would be very unreaſonable.

In Courts of Equity, Intereſt in a Caſe like the preſent is always computed to the Day when it is probable the Maſter's Report will be confirmed; and there ſeems to be no Reaſon, why a Jury, in aſſeſſing Damages, ſhould not in a Caſe like the preſent compute Intereſt to the Day upon which Judgment may be ſigned. In the preſent Caſe, as the Jury have not aſſeſſed Damages to any certain Amount,

Amount, the Court may order Intereſt to be computed to the Time of the Judgment.

2 Saund. 170. Hambleton v. Vere, 1 Lev. 299. S. C.

In an Action upon the Caſe for ſeducing an Apprentice of the Plaintiff's: By Reaſon whereof the Plaintiff loſt the Service of the Apprentice for the Reſidue of the Term he was bound for, there was a general Verdict for the Plaintiff with entire Damages. Judgment was arreſted; and *per Cur.* As entire Damages are aſſeſſed, and it appears from the Declaration, that the Term for which the Apprentice was bound is not expired, the Plaintiff, if Judgment ſhould be given for him, would recover Damages for a Loſs of Service ſubſequent to the commencement of the Action; whereas he ought only to recover Damages for the Loſs of Service ſuſtained at the Time of bringing the Action. It has been ſaid, that the Court may intend, that

that the Damages aſſeſſed were aſſeſſed for the Loſs of Service ſuſtained at the Time of bringing this Action; but the Court cannot intend this; for the Court muſt in every Caſe intend, unleſs the Contrary appear from the Verdict, that the Damages are aſſeſſed for the whole Cauſe of Action alledged by the Plaintiff in his Declaration.

Upon a Writ of Enquiry in an Action of Covenant, in which the Breach aſſigned was the not having repaired certain Premiſſes, the Jury, in aſſeſſing Damages, computed the Expence the Plaintiff had been at in doing Repairs, which became neceſſary between the Time of commencing the Action and that of awarding the writ of Enquiry, and final Judgment was given for the Plaintiff. An Action of Error being brought, the Judgment was affirmed; and *per Cur.* If it appeared to

Lord Raym. 803. Shortridge v. Lamplugh.

the Jury, that the Premiſſes became more out of Repair after the commencement of the Action, they did right to conſider this in aſſeſſing Damages.

1 Ventr. 103. Ward v. Rich, Mich. 22 Car. 2.

In an Action of Treſpaſs for taking away the Wife of the Plaintiff, and detaining her to a Day ſubſequent to the Day of exhibiting the Bill, there was a general Verdict for the Plaintiff with entire Damages. Judgment was arreſted; and *per Cur.* It muſt be inetnded, that the Jury have aſſeſſed Damages for detaining the Wife during the whole Time mentioned in the Declaration; and conſequently, that they have aſſeſſed Damages for the Detention of her at a Time ſubſequent to the Commencement of the Action; which they ought not to have done.

Lord Raym. 329. Braſfield v.

In an Action of Treſpaſs, wherein the Plaintiff alledged that the Defendant

dant aſſaulted, beat and impriſoned him upon the firſt Day of *October* in the ninth Year of the Reign of *William* the third, and detained him in Priſon for the ſpace of four Months, there was a general Verdict for the Plaintiff with entire Damages. Judgment was arreſted; and *per Cur.* As the Declaration is of *Michaelmas* Term, and entire Damages are aſſeſſed, the Jury have aſſeſſed Damages for the Impriſonment of the Plaintiff at a Time ſubſequent to the Commencement of the Action; which they had no Power to do. Lee, Paſch. 12 W. 3.

In an Action of Treſpaſs the Plaintiff declared for the taking away of his Wife, *per Quod Conſortium ejus per magnum Tempus*, viz. *per Spatium unius Anni amiſit.* A general Verdict being found for the Plaintiff with entire Damages, it was on a Motion in Arreſt of Judgment inſiſted that the Verdict is bad, Damages being there- 10 Mod. 273. Walter v. Warren, Hil. 1 G. 1.

by aſſeſſed for a Time ſubſequent both to the bringing of the Action and the Verdict, and the Caſe of *Hamilton* and *Vere*, 1 *Lev.* 299, was relied upon. It was on the other ſide inſiſted, that what is alledged under the *per quod* is not to be conſidered as the Cauſe of Action, but as laid merely in Aggravation of Damages, and further, that if it is to be conſidered as the Cauſe of Action, the Words *per magnum Tempus* being ſufficient, the other Words *per ſpatium unius Anni* may be rejected as ſurpluſage. The Caſe was adjourned: But by *Parker* Ch. J. As it is uncertain for how much of the Time alledged the Jury did aſſeſs Damages, it may be intended, that they aſſeſſed them only to the Time of the Verdict.

CHAP.

CHAP. XXVIII.

Of encreaſing or abridging the Damages aſſeſſed by the Jury who tried the Iſſue joined in an Action.

THE Power of encreaſing the Damages which have been aſſeſſed by the Jury, who tried the Iſſue joined in an Action, has not for many Years been exerciſed by Courts in an Action, except in an Action for a corporal Hurt; and the Power of abridging ſuch Damages, is not at this Day exerciſed in any Action.

As the Power of encreaſing ſuch Damages is ſtill exerciſed in an Action for a corporal Hurt, the

Knowledge of the Law relative thereto is quite neceſſary; and it will not it is hoped be thought improper, to ſhew how the Law ſtood, while the Power of encreaſing or abridging ſuch Damages was exerciſed by Courts in other Actions as well as in an Action for a corporal Hurt.

1 Roll. Abr. 573. M. Pl. 1. Juſtices of *Niſi Prius*, before whom the Iſſue joined in an Action was tried, have no Power to encreaſe the Damages aſſeſſed by the Jury.

Bro. Dam. Pl. 47. 1 Roll. Abr. 572. Pl. 8. It is laid down, that the Juſtices of the Court, wherein the Action for a Mayhem is depending, cannot encreaſe the Damages aſſeſſed by the Jury who tried the Iſſue joined therein, notwithſtanding the Judge before whom the Iſſue was tried do certify, that it appeared to him upon a View of the Mayhem, that the Damages are too ſmall.

But

But it has been holden, that if at the Trial of the Iſſue joined in an Action of Treſpaſs for a Wound, Evidence be given of a Great Wound, and a Certificate of the Evidence be indorſed upon the *Poſtea* by the Judge before whom the Iſſue was tried, the Court, upon ſuch Certificate and a View of the Wound, may encreaſe the Damages aſſeſſed by the Jury. Lord Raym. 177. Cook v. Beal.

It was moreover in this Caſe holden, that if the Iſſue was tried before a Judge of the Court in which the Action is depending, it is not neceſſary that a Certificate of the Evidence ſhould be indorſed upon the *Poſtea*; for that, upon a Report of the Evidence by the Judge and a View of the Wound, the Court may encreaſe the Damages, although there be not ſuch a Certificate. Ibid.

Bro. Dam. Pl. 49. 1 Roll. Abr. 572. Pl. 9.

It is laid down, that if any Juſtice of the Court, wherein an Action for a Mayhem is depending, the Court, although the View was not had in Court, may upon his Report encreaſe the Damages aſſeſſed by the Jury, who tried the Iſſue joined in the Action.

1 Ventr. 353. Anon. Hil. 32 Car. 2.

It is in one Caſe ſaid, that the Damages aſſeſſed by the Jury, who tried the Iſſue joined in an Action for a Mayhem, cannot be increaſed by the Judge of an Inferior Court.

Sir Tho. Jo. 183. Anon. Mich. 33 Car. 2.

But in another Caſe it was holden in an Action of Error, that the Judge of an Inferior Court may, upon a View of the Mayhem for which the Action was brought, encreaſe the Damages aſſeſſed by the Jury, who tried the Iſſue joined in the Action.

It

It is in one Caſe laid down generally, that the Damages aſſeſſed by the Jury, who tried the Iſſue joined in an Action, can neither be encreaſed nor abridged by the Court; for that the Remedy of the Party who is diſſatisfied with the Verdict is by an Action of Attaint. Bro. Abridg. Pl. 7.

But it is in another Caſe ſaid, that what is laid down in this Caſe extends only to Actions, wherein the Court cannot come at a certain Knowledge of the Damages which have been ſuſtained. Bro. Abridg. Pl. 36.

It is moreover in divers other Caſes laid down, that in every Action wherein the Demand of the Plaintiff is certain, as an Action of Debt, the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action may be encreaſed by the Court. Bro. Dam. Pl. 137. Pl. 139. Bro. Coſt, Pl. 28.

In

Bro. Abridg. Pl. 36. Bro. Coſt, Pl. 7.

In an Action of Treſpaſs for cutting down Trees it was holden, that the Court could not encreaſe the Damages aſſeſſed by the Jury who tried the Iſſue joined therein; becauſe the Court could not come at a certain Knowledge of the Damages which had been ſuſtained.

1 Brownl. 204. Delves v. Wyer.

In an Action of Treſpaſs for cropping Trees the Jury who tried the Iſſue joined aſſeſſed Damages to the Amount of forty Pounds. As it did not appear to the Court with proper certainty what Damages had been ſuſtained, it was holden, that the Damages could not be abridged, notwithſtanding there was an Affidavit, in which it was ſworn, that the Plaintiff had offered to accept five Pounds in ſatisfaction of the Treſpaſs.

1 Rol. Abr. 572. L. Pl. 1.

In an Action of Treſpaſs for taking Goods, wherein Damages were alledged

ledged to the Amount of forty Pounds, the Defendant pleaded an Award in another County, and Iſſue was joined upon the Plea. There being a Verdict for the Plaintiff with only twenty Pounds Damages, it was holden, that in as much as the foreign Jury could not have full Conuſance of the Treſpaſs, and the Defendant had not denied the Damages to be as alledged, the Court might encreaſe the Damages to Forty Pounds.

It is in one Caſe ſaid, that by the ſame Law, whereby the Court may encreaſe the Damages aſſeſſed by the Jury who tried the Iſſue joined in an Action, they may abridge them. Bro. Judges, Pl. 22.

It is in one Caſe ſaid, that if in an Action, wherein the Court cannot come to a certain Knowledge of the Bro. Abridg. Pl. 7.

the Damages which have been ſuſtained, the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action are exceſſive, the Court may ſtay Judgment; until the Plaintiff does by entering a *Remittitur* as to Part reduce the Damages to a reaſonable Sum.

Bro. Judges, Pl. 22. The Jury who tried the Iſſue joined in an Action of Replevin found a Verdict for the Plaintiff, and aſſeſſed Damages to the Amount of twenty Pounds. The Damages being in the Opinion of the Court too large, it was holden that Judgment ſhould be ſtayed; unleſs the Plaintiff would releaſe Part of them.

Cro. Eliz. 223. Anon. It has been holden, that the Damages aſſeſſed by the Jury, who tried the Iſſue joined in an Appeal of Felony, may be encreaſed by the Court; it being directed by the Statute of *Weſtminſter*, that Damages ſhall be given

given to the Defendant, who has been acquitted upon an Appeal of Felony, according to the Diſcretion of the Juſtices, Reſpect being had to the Impriſonment which the Party appealed has ſuffered.

It is laid down in one Caſe generally, that the Court can neither encreaſe nor abridge the Damages aſſeſſed by the Jury, who tried the Iſſue joined in an Action upon the Caſe for Words. Jenk. Cent. 63. Pl. 29.

It was in another Caſe holden, that the Damages aſſeſſed by the Jury, who tried the Iſſue joined in an Action upon the Caſe for Words could not be abridged by the Court. Dyer 105. Bonham v. Lord Sturton.

In another Caſe the Court were of Opinion, that too great Damages had been aſſeſſed by the Jury who tried the Iſſue joined in an Action Palm. 314. Hawkins v. Sciet.

upon the Caſe for Words, and at one Time ſeemed inclined to abridge them: But it was upon great Conſideration reſolved, that the Damages could not be abridged; for that the Jury were the proper Judges of the Quality and Eſtate of the Plaintiff, and of the Damages he had ſuſtained.

1 Roll. Abrid. 573. Freeman v. Trevers.

In an Appeal of Mayhem the Damages aſſeſſed by the Jury, who tried the Iſſue joined in the Appeal, which were only twenty Marks, were, upon a View of the Mayhem and the Information of Surgeons that the Plaintiff had loſt the Uſe of one Hand, encreaſed by the Court to one hundred Pounds.

As it would if poſſible be very difficult to reconcile the Caſes, which relate to the encreaſing of the Damages aſſeſſed by the Jury who tried the Iſſue joined in an Action for a cor-

corporal Hurt, it will be beſt to mention the Principal ones upon the Point; which ſhall be done in order of Time as they were determined.

In an Action of Treſpaſs, wherein the Plaintiff alledged that the Defendant beat and maimed him, Iſſue was joined upon the Plea of not Guilty, and there was a Verdict for the Plaintiff with eighteen Pounds Damages. At the Day in Bank the Plaintiff ſhewed the Mayhem in Court, and prayed an Encreaſe of Damages. It was thereupon awarded, that he ſhould recover twenty-two Pounds for Damages, over and above the eighteen Pounds aſſeſſed by the Jury. Bro Dam. Pl. 86. 39 E. 3. 20.

In an Action of Treſpaſs an Aſſault and Battery were alledged, and it was likewiſe alledged that the Defendant had cut off the Right Dyer 105. Tripcony's Caſe, Mich 2 Ph. and M.

Hand of the Plaintiff. The Defendant pleaded *Son assault Demesne*, and the Issue joined upon the Plea was found for the Plaintiff with fifty Pounds Damages. The Damages were upon a View of the Mayhem encreased by the Court to one hundred Pounds.

1 Leon. 139. Mallet v. Ferrer's, Hil. 30 Eliz.

In an Action of Trespass, wherein an Assault and Battery were alledged, it appeared at the Trial of the Issue joined in the Action that the Thumb of the Plaintiff's Right Hand was cut off. There being a Verdict for the Plaintiff with forty Pounds Damages, he came afterwards into Court and prayed, that the Court, on Account of the Heinousness of the Mayhem, would encrease the Damages. It was holden upon great Consideration, that they should be encreased to one hundred Pounds.

Latch 223. Hooper v. Pope, Hil. 2 Car. 1.

In an Action of Trespass, wherein an Assault and Battery were alledged, and

and it was likewiſe alledged that the Defendant had wounded the Plaintiff upon the Hand, a Queſtion aroſe, whether the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action ſhould be encreaſed. It was inſiſted for the Defendant, that as the Plaintiff had not, as was done in *Tripcony*'s Caſe *Dyer* 105, alledged a Mayhem; the Court could not encreaſe the Damages. It was ordered by the Court, that a Wound, which was then apparent upon the Hand of the Plaintiff, ſhould be examined by a Surgeon. Afterwards upon an affidavit of the Surgeon, that there was a Mayhem, together with a Certificate of the Judge before whom the Iſſue was tried, that the Wound viewed by the Surgeon was the Wound alledged by the Plaintiff, the Damages were encreaſed by the Court.

Sty. 345. Jervis v. Lucas, Mich. 3 Car. 2.

In an Action of Treſpaſs, wherein a Battery and wounding were alledged, the Jury who tried the Iſſue joined, had aſſeſſed Damages to the Amount of only twelve Pence. It was in fact true, that one of the Plaintiff's Arms had been broken by the beating, and that he was in Danger of loſing the Uſe of it: Yet as the Manner of the Beating was not ſet out, the Court refuſed to encreaſe the Damages; and by *Roll.* Ch. J. The Arm may perhaps have been broken ſince the Beating.

1 Sid. 308. Angel v. Shatterton, Hil. 15 Car. 2.

In an Action of Treſpaſs, wherein it was alledged that the Defendant had mayhemed the Plaintiff, the Court refuſed to encreaſe the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action; and *per Cur.* As the Manner of the Mayheming is not ſet out, nor certified to the Court by the Judge before whom

whom the Iſſue was tried, the Damages ought not to be encreaſed; for unleſs the Manner of the Mayheming appear from the Declaration or from a Certificate of the Judge, the Court cannot be certain, that the Mayhem ſhewn to them is the Mayhem for which the Action was brought.

In an Action of Treſpaſs, wherein a Battery and Mayhem were alledged, there was a Verdict for the Plaintiff with only ten Shillings Damages. Upon a Motion to encreaſe the Damages it was inſiſted for the Defendant, that as the Manner of Mayheming is not ſet out the Court could not encreaſe the Damages. It was holden upon a View of the Plaintiff's Arm, which had been broken by the Beating, that the Damages ſhould be encreaſed to twenty Pounds; and by *Hale* Ch. J. If in an Action of Treſpaſs a Battery only be alledged, the

Hardr. 408. Auſtin v. Hilliars, Paſch. 17 Car. 2.

the Damages cannot be encreaſed, unleſs the Manner of the Battery be ſet out, and it is uſual and the better Way, to ſet out the Manner of Mayheming: But it is not abſolutely neceſſary to do this; for wherever a Mayhem is alledged, the Damages may be encreaſed upon a View of the Mayhem, although the Manner of Mayheming be not ſet out.

Freem. 173. Moſes's Caſe, Mich. 24 Car. 2.

In an Action of Treſpaſs, wherein an Aſſault and Battery were alledged, there was a Verdict for the Plaintiff with only five Pounds Damages. The Damages were encreaſed to one hundred Pounds; it appearing to the Court, upon a View of the Plaintiff's Hand, that he had loſt two Fingers, and was thereby diſabled from following his Buſineſs of Cloth-ſhaving.

1 Ventr. 327. Anon. Hil. 30 Car. 2.

In an Action of Treſpaſs, wherein a Battery and Wounding were alledged,

ledged, the Court was moved that the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action might be encreaſed. It was holden, that they could not; and *per cur.* We cannot encreaſe the Damages in ſuch an Action, unleſs the Word *Maihemavit* be inſerted in the Declaration.

In an Action of Treſpaſs brought by an Officer of the Exciſe it was alledged that the Defendant ſtruck the Plaintiff with his Hand upon the left Eye, and hurt it ſo much, that he was rendered almoſt incapable of writing or reading. Upon a Motion to encreaſe the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action it was reſolved, that although the Word *Maihemavit* be not inſerted in the Declaration in an Action of Treſpaſs, if it appear by the Deſcription of the

1 Lord Raym. 176. Cook and Beal, Hil. 9 W. 3.

the Wound that there was a Mayhem, the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action may be encreaſed. It was likewiſe reſolved, that where an Action of Treſpaſs is brought for a corporal Hurt which is apparent, the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action may, although the Hurt do not amount to a Mayhem, be encreaſed. It was as a Conſequence of the ſecond Reſolution holden, that as the Hurt was in the preſent Caſe apparent, although it did not amount to a Mayhem, the ſight of the Eye not being entirely loſt, the Damages aſſeſſed by the Jury who tried the Iſſue joined in the Action ought to be encreaſed, and the Damages were encreaſed.

1 Barn. 106. Burton v. Baynes, Mich. 7 G. 2.

In an Action of Treſpaſs, wherein a Battery and Mayhem were alledged, the Jury found a Verdict for the

the Plaintiff with eleven Pounds fourteen Shillings Damages. It appearing to the Court, upon a View of one of the Plaintiff's Eyes and the Examination of a Surgeon, that he had almoſt loſt the ſight thereof, the Damages were encreaſed to fifty Pounds.

In an Action of Treſpaſs againſt *J. S.* and *J. N.* wherein a Mayhem was alledged, *J. S.* appeared, and Damages to the amount of thirty Pounds were aſſeſſed againſt him by the Jury who tried the Iſſue joined in the Action, which were upon a View of the Mayhem encreaſed by the Court to forty Pounds. There being afterwards a Verdict againſt *J. N.* the Coſt was moved upon an Affidavit, in which it was ſworn, that *J. S.* had murdered the Officer who went to ſerve the Writ of Execution againſt him for the forty Pounds Damages, and that it was there- Litt. Rep. 51. Anon.

therefore probable that the Plaintiff would never recover thoſe Damages from *J. S.* that the Damages aſſeſſed againſt *J. N.* might be encreaſed. The Motion was holden to be premature; and *per Cur.* It is not uſual for the Court to encreaſe Damages a ſecond Time in the ſame Action: But if *J. S.* ſhould be executed for the Murder, the Court, as the Damages increaſed againſt him to forty Pounds will then be quite irrecoverable, may upon a ſecond View of the Mayhem encreaſe the Damages aſſeſſed againſt *J. N.*

Sid. 433. Burford and Wife v. Dadwell.

In an Action of Treſpaſs brought by a Huſband and his Wife it was alledged, that the Defendant aſſaulted the Wife and ſtruck the Horſe whereon ſhe rode, ſo that it run away with her, and ſhe was thrown upon the Ground; and another Horſe came and trod upon her Hand; whereby ſhe loſt the Uſe of three Fingers.

Fingers. There being a Verdict for the Plaintiffs upon an Iſſue joined on the Plea of Not guilty, a Queſtion aroſe, whether the Damages aſſeſſed by the Jury could be encreaſed by the Court, upon a View of the Hand and the Examination of Surgeons. It was holden that they could not; and *per Cur.* The Wound was certainly not given by the Defendant, nor does it appear to the Court to have been the neceſſary Conſequence of what he did; for the Wife might perhaps have avoided the being trod upon by the other Horſe. Whether ſhe could or could not have done this was a Matter of Evidence, which was proper for the Conſideration of the Jury who tried the Iſſue.

CHAP. XXIX.

Of encreaſing or abridging the Damages aſſeſſed upon a Writ of Enquiry.

14 H. 4. 9. 3 H. 6. 29. 19 H. 6. 28. Bro. Abr. Pl. 7.

IT is in divers Books laid down, that the Damages aſſeſſed upon a Writ of Enquiry may be encreaſed or abridged at the Pleaſure of the Court. For that, as the Juſtices might themſelves have awarded Damages without the Writ of Enquiry, the Inquiſition thereupon is nothing more than an Inqueſt of Office for their Information.

There is another Reaſon aſſigned in theſe Books, why the Juſtices may increaſe

increaſe or abridge the Damages aſſeſſed upon a Writ of Enquiry at their Pleaſure; namely, that an Action of Attaint does not lie againſt the Jury on Account of the Damages aſſeſſed upon a Writ of Enquiry.

It is in two Books laid down generally, that if there be Judgment upon a Demurrer for the Plaintiff, and Damages are aſſeſſed upon a Writ of Enquiry, the Damages may be increaſed by the Court. 14 H. 4. 9. 3 H. 6. 29.

In an Action of Treſpaſs, wherein there was Judgment by Default, Damages were aſſeſſed to the Amount of Twenty Pounds. The Damages were afterwards abridged by the Court to Twenty Marks. 19 H. 6. 10.

In an Action of Treſpaſs for an Aſſault, Battery, and Wounding, wherein the Manner of the Wounding was ſet out, Two Hundred 1 Roll. Abr. 573. Ley v. Lord Foliot.

Pounds Damages were aſſeſſed upon a Writ of Enquiry. The Damages were afterwards increaſed by the Court, upon the Examination of Surgeons and a View of the Wound, to Four Hundred Pounds; it appearing, that the Plaintiff had by Reaſon of the great Loſs of Blood been in Danger of his Life, and that the Surgeon was to have One Hundred and Fifty Pounds for the Cure of the Wound.

27 H. 8. 2. But it is however in one Caſe, laid down, that the Damages aſſeſſed upon a Writ of Enquiry in an Action of Treſpaſs *quare Clauſum fregit*, cannot be increaſed or diminiſhed; for that the Court cannot take Notice of the Damage which has been occaſioned by a local Treſpaſs.

7 H. 4. 31. It is in one Caſe laid down, that the Damages aſſeſſed upon a Writ of

of Enquiry in an Action for Conſpiracy may be abridged by the Court.

CHAP. XXX.

Of granting a new Trial on Account of the Smallneſs of the Damages.

IT is in one Caſe laid down, that if in an Action which ſounds in Damages, as in an Action of Treſpaſs, any Damages are aſſeſſed, the Court, although only Half a Farthing Damages be aſſeſſed, will not grant a new Trial; for that it is in the Power of the Jury to aſſeſs as 2 Rol Rep. 21. Marſham v. Buller.

ſmall Damages as they think proper in ſuch an Action.

Str. 940. Heyward v Newton, Mich. 6 G. 2.

In an Action upon the Caſe for theſe Words, "You are a Rogue, "and ſell by ſhort Meaſure," there was a Verdict for the Plaintiff with Twenty Shillings Damages. A new Trial being moved for on Account of the Smallneſs of the Damages, it was refuſed; and *per cur.* This is a very hard Caſe; but the Court has always refuſed to grant a new Trial on Account of the Smallneſs of the Damages.

Stra. 1051. Barker v. Woolſton, Trin. 9 G. 2.

In an Action upon the Caſe for a malicious Proſecution of an Indictment for Felony, there was a Verdict for the Plaintiff with Five Shillings Damages. Upon a Motion for a new Trial on Account of the Smallneſs of the Damages, it was holden that a new Trial cannot be granted upon that Account.

In

In an Action upon the Statute of *Scandalum Magnatum* for theſe Words, "God damn my Lord *G——r*, he "is a Rogue, and all on his Side "are Rogues," there was a Verdict for the Plaintiff with Twelve Pence Damages. A new Trial being moved for on Account of the Smallneſs of the Damages, it was refuſed; and *per cur.* Notwithſtanding there ſeems to be as much Reaſon for the granting of a new Trial on Account of the Smallneſs of the Damages as on Account of the Largeneſs thereof: Yet as no Inſtance has been produced of its having been done, the Court cannot do it. 1 Barn. 332. Lord G—r v. Heath, Trin. 13 G. 2.

In an Action of *Aſſumpſit* for the Cure of a Wound, the Jury found a Verdict for the Plaintiff with Twenty-five Pounds Damages. A new Trial being moved for on Account of the Smallneſs of the Damages, 2 Barn. 367. Ruſſel v. Ball, Eaſt. 18 G. 2.

mages, it was refuſed; and *per cur.* The Court cannot grant a new Trial on Account of the Smallneſs of the Damages.

Salk. 647. Anon. Mich. 10 W. 3. It is in one Caſe ſaid, that the Rule of not granting a new Trial on Account of the Smallneſs of the Damages, does not extend to an Action for the Breach of a Covenant, by which it is covenanted, that a certain Sum of Money ſhall in a certain Caſe be paid.

Str. 425. Woodford v. Eades, East. 7 G. 32. It is in another Caſe ſaid, that the Rule of not granting a new Trial on Account of the Smallneſs of the Damages does not extend to a Caſe, wherein the Jury were miſtaken in a Point of Law.

2 Barn. 354. Tutton v. Andrews, Trin. 14 G. 2. It is in another Caſe ſaid, that a Notion has prevailed, that a new Trial cannot be granted on Account of the Smallneſs of the Damages; whereas

whereas there is as much reaſon for the granting of a new Trial on Account of the Smallneſs of the Damages, as of the Largeneſs thereof.

It is in another Caſe ſaid, that if an Action of *Aſſumpſit* be brought upon a promiſſory Note, the Court, as the Demand is in ſuch Caſe certain, may grant a new Trial on Account of the Smallneſs of the Damages. 2 Barn. Ruſſel v. Ball, Eaſt. 18 G. 2.

But notwithſtanding what is ſaid in theſe Caſes, no Caſe is to be met with, in which a new Trial has in Fact been granted on Account of the Smallneſs of the Damages.

It is moreover in one Caſe ſaid, that the Practice of granting a new Trial in an Action was introduced to ſupply the Place of an Action of Attaint; as being an eaſier and more expeditious Remedy. 2 Str. 1051. Barker v. Woolſton.

It

2 Str. 1051. Barker v. Woolston.

It is in this Caſe ſaid likewiſe, that an Action of Attaint does not lie for aſſeſſing too ſmall Damages; becauſe the Verdict is not in ſuch Caſe a falſe Verdict.

If it be true, that the Practice of granting a new Trial in an Action was introduced to ſupply the Place of an Action of Attaint; and if it be likewiſe true, that an Action of Attaint does not lie for aſſeſſing too ſmall Damages; it ſeems to be the better Opinion, that the Court cannot grant a new Trial in any Action on Account of the Smallneſs of the Damages.

CHAP.

CHAP. XXXI.

Of awarding a new Writ of Enquiry on Account of the Smallneſs of the Damages.

IT is in the general true, that the Court will not award a new Writ of Enquiry on account of the Smallneſs of the Damages.

A Motion being made by the Plaintiff for a new Writ of Enquiry on Account of the Smallneſs of the Damages, it was refuſed; and *per cur.* The Court never awards a new Writ of Enquiry at the Inſtance of the Plaintiff, except there has been a Miſ- Rep. of Ca. in C. B. 135. Gilbert v. Nightingale, Mich. 10 G. 2.

Miſbehaviour in the Sheriff or ſome other Perſon.

2 Leon. 214. Anon. Mich. 30 Eliz.

In an Action of Treſpaſs *quare Clauſum fregit*, wherein the Plaintiff declared with a *Continuando* for ſix Years, there was a Judgment by Default, and Ten Shillings Damages were aſſeſſed upon a Writ of Enquiry. A new Writ of Enquiry was refuſed, notwithſtanding it appeared, that the Land of which the Plaintiff had been kept out of Poſſeſſion ſix Years was worth Four Pounds a year; and *per cur.* If there be any Miſbehaviour in the Plaintiff, or if the Damages are exceſſive, the Court will ſometimes award a new Writ of Enquiry at the Prayer of the Defendant; but the Court will never do this at the Prayer of the Plaintiff, becauſe the ſuing out of the Writ of Enquiry was his own Act.

A new

A new Writ of Enquiry being moved for by the Plaintiff on Account of the Smallneſs of the Damages, it was refuſed; and *per cur.* If any Damages are aſſeſſed upon a Writ of Enquiry the Inquiſition muſt ſtand. 1 Barn. 154. Burges v. Nightingale, Mich. 10 G. 2.

Upon a Writ of Enquiry in an Action of Aſſault and Battery, only Eight Pounds Damages were aſſeſſed, notwithſtanding Evidence was laid before the Jury by the Plaintiff, that the Cure of the Plaintiff was worth Eighteen Guineas, and no Evidence to the contrary was laid before the Jury by the Defendant. A new Writ of Enquiry was moved for by the Plaintiff; but the Court refuſed to award one. 2 Barn. 129. Donelly v. Baker, Mich. 18 G. 2.

But in ſome Caſes the Court will award a new Writ of Enquiry on Account of the Smallneſs of the Damages.

2 Shaw 20. Creſwick v. Saunders, Paſch. 34 Car. 2.

A new Writ of Enquiry was awarded; becauſe the Damages aſſeſſed upon a former Writ were unreaſonably ſmall.

Salk. 647. Anon. Mich. 10 W. 3.

In an Action for the Breach of a Covenant, by which the Defendant had covenanted to pay a Hundred Pounds in a certain Caſe, there was a Verdict for the Plaintiff with Twenty Pounds Damages. A new Writ of Enquiry was awarded; and *per cur.* As an Action of Debt might have been brought for the Sum mentioned in the Covenant, there muſt in this Caſe have been ſome Contrivance.

Str. 425. Woodford v. Eades, 7 G. 1.

Upon a Contract for Stock the Plaintiff and *J. S.* did each depoſit Two Hundred Pounds in the Hands of the Defendant. As *J. S.* did not perform his Part of the Contract, the Plaintiff brought an Action for the Four Hundred Pounds; and obtained

ed Judgment upon a Demurrer. A Writ of Enquiry being awarded the Jury, under a Notion that the Defendant was not juſtified in parting with the Money without the Conſent of *J. S.* aſſeſſed only One Penny Damages. A new Writ of Enquiry was awarded; and *per cur.* The Rule of not awarding a new Writ of Enquiry, on Account of the Smallneſs of the Damages, does not extend to this Caſe; in which the Jury miſtook the Law.

Upon the Execution of a Writ of Enquiry, the Sheriff admitted improper Evidence to be given by the Defendant, whereby the Damages were much leſſened. A new Writ of Enquiry was awarded. And *per cur.* A Notion has prevailed that a new Writ of Enquiry cannot be awarded on Account of the Smallneſs of the Damages; whereas there is as much Reaſon for awarding one

2 Barn. 354. Tutton v. Andrews, Trin. 14 G. 2.

on Account of the Smallneſs of the Damages, as of the Largeneſs thereof.

Str. 515. Stone v. Hall, East. 8 G. 2.

Upon a Motion by the Plaintiff for a new Writ of Enquiry on Account of the Smallneſs of the Damages it appeared, that at the Execution of the Writ the Plaintiff, who was ſurpriſed with a Defence, was not prepared to prove his whole Demand. A new Writ of Enquiry was awarded upon the Payment of Coſts.

Str. 1252. Markham v. Middleton, Hill. 19 G. 2.

There being Judgment by Default in an Action for an Apothecary's Bill, amounting to Three Hundred Pounds, a Witneſs was produced upon the Execution of a Writ of Enquiry, who had ſaid, that he could prove the Bill; but when the Jury was ſworn he refuſed to give Evidence. Hereupon the Sheriff was deſired to adjourn: But he

he was of Opinion that he could not do this, and a Penny Damages were aſſeſſed. A new Writ of Enquiry being moved for by the Plaintiff, one was awarded upon the Payment of Coſts; and *per cur.* If this Inquiſition ſhould ſtand, the Plaintiff, as he would receive only a Penny for a very large Debt, would be in a much worſe Condition than if the Defendant had pleaded to Iſſue; for if he had done this, and the Plaintiff had at the Trial of the Iſſue failed in proving his Debt, he might have ſuffered a Nonſuit, and might afterwards have brought another Action.

CHAP. XXXII.

Of granting a new Trial on Account of the Exceſſiveneſs of the Damages.

AS the Law does not ſeem to be ſettled concerning the granting of a new Trial on Account of the Exceſſiveneſs of the Damages, it will be proper to mention the principal Caſes upon the Point, which ſhall be done in order of Time as they were determined.

Sty. 462. Wood v. Gunſtone, Mich. 7 Car. 2.

It was in one Caſe holden, that a new Trial ſhould be granted in an Action upon the Caſe for Words, becauſe

becauſe the Damages were exceſſive.

But it is probable, that one Reaſon for the granting of the new Trial in this Caſe was, that the Jury had not in finding the Verdict paid a proper Attention to the Direction of the Judge; for it is ſaid by *Glynn* Ch. J. that wherever the Court ſees, that the Verdict was contrary to the Direction of the Judge before whom the Cauſe was tried, a new Trial may be granted.

And in another and fuller Report of this Caſe in the ſame Book it appears, that the new Trial was not granted merely on Account of the Exceſſiveneſs of the Damages, but becauſe the Jury had ſhewn a Partiality to the Plaintiff. Sty. 466.

In an Action upon the Statute of *Scandalum Magnatum* for theſe Words, " He is an unworthy Man " and 2 Mod. 150. Lord Townſhend v. Hughes, Hil. 28 Car. 2.

" and acts againſt Law and Rea-
" ſon," there was a Verdict for the Plaintiff with Four Thouſand Pounds Damages. Upon a Motion for a new Trial on Account of the Exceſſiveneſs of the Damages it was ſworn, that one of the Jury had confeſſed, that he and his fellows did not aſſeſs ſuch great Damages becauſe they thought the Plaintiff was ſo much damnified, but that he might have an Opportunity of ſhewing himſelf noble by remitting the Damages.

A new Trial was refuſed, and by *North* Ch. J. as the Court cannot tell what Value to ſet upon the Honour of the Plaintiff, and the Jury, who are by Law the proper Judges of Damages, have thought fit to aſſeſs Four Thouſand Pounds Damages, the Court can neither abridge the Damages nor grant a new Trial. It would be attended with very great Inconve-

Inconveniencies, if the Court ſhould take Notice upon what Account the Jury did aſſeſs ſuch Damages as are aſſeſſed.

Wyndham J. was of the ſame Opinion.

Atkins J. was of a different Opinion, and by him: The Jury ought not to have aſſeſſed ſuch great Damages, in Order to give the Plaintiff an Opportunity of ſhewing his Nobleneſs by remitting them. The Court may in this Caſe certainly take Notice of what is contained in the Declaration, and as a Conſequence thereof they may conſider whether the Words and Damages are proportionate. I admit that the Court cannot in the preſent Caſe abridge the Damages; but they have a Power of granting a new Trial if they ſhould be of Opinion that the Damages are too great.

Scroggs

Scroggs J. If I had been upon the *Jury*, I ſhould not have been for aſſeſſing ſo great Damages; and if I had been the Plaintiff I would not have taken advantage of the Verdict; but I do not ſit here to give Advice, but to do Juſtice. Whereever there has been any Practice upon the Jury a new Trial ought to be granted; but it does not appear that there was any in the preſent Caſe. If the Jury had aſſeſſed only a Penny Damages the Court would not have granted a new Trial, in Order to give the Plaintiff a Chance of obtaining greater Damages; and it would ſurely be equally unreaſonable to grant a new Trial, in Order to give the Defendant a Chance of having leſſer Damages aſſeſſed.

Sir Tho. Jo. 200. Boulſworth v. Pilkington, Hil. 33 Car. 2.

In an Action upon the Caſe for theſe Words ſpoken of a Tradeſman, "Thou art a beggarly Raſcal, go pay "thy Debts;" there was a Verdict

dict for the Plaintiff with Eight Hundred Pounds Damages. A new Trial being moved for on Account of the Exceſſiveneſs of the Damages, the Judge before whom the Cauſe was tried reported, that it did not appear at the Trial of the Cauſe, that the Plaintiff had given the Defendant any Provocation to ſpeak the Words; and that in his Opinion the Jury had given a Verdict according to their Conſciences. A new Trial was refuſed.

In an Action of Treſpaſs for an Aſſault and falſe Impriſonment there was a Verdict for the Plaintiff with Two Thouſand Pounds Damages. As the Plaintiff had been only confined by her Mother for the Space of two or three Hours, a new Trial was granted on Account of the Exceſſiveneſs of the Damages; and by *Holt* Ch. J. the Jury were ſhy of giving their

Comb. 357. Aſh v. Aſh, Hill. 8 W. 3.

their Reaſon for finding the Verdict as it is found, imagining that they had an abſolute Power to find a Verdict as they pleaſed. They were miſtaken in this; for the Jury are to try a Cauſe with the Aſſiſtance of the Judge, and they ought, if required by the Judge, to give their Reaſon for finding the Verdict as it is intended to be found, that if they have proceeded upon a wrong Notion they may be ſet right.

Str. 692. Chambers v. Robinſon, Hil. 12 G. 1.

In an Action upon the Caſe, for a malicious Proſecution of an Indictment for Perjury, there was a Verdict for the Plaintiff with a Thouſand Pounds Damages. A new Trial was granted on Account of the Exceſſiveneſs of the Damages; and *per cur.* It is fit the Defendant ſhould try another Jury, before he is finally charged with the Damages of a Thouſand Pounds.

In

In an Action for Criminal Converſation there was a Verdict for the Plaintiff with five hundred Pounds Damages. Upon a Motion for a new Trial it appeared from the Report of Lord *Mansfield* Ch. J. Before whom the Cauſe was tried, that the Wife had ſeduced the Defendant; and that the Defendant was in low Circumſtances, being only a Clerk in the *Exchequer* with a Salary of Fifty Pounds a Year. A new Trial was refuſed; and by Lord *Mansfield* Ch. J. The Jury had all the Circumſtances of the Caſe under their Conſideration; and they are the proper Judges of Damages in an Action founded upon a *Tort*. MS. Rep. Wilsford v. Berkley, Trin. 31 G. 2. in K. B.

In an Action of Treſpaſs for an Aſſault and falſe Impriſonment, there was a Verdict for the Plaintiff with three hundred Pounds Damages. A new Trial being moved for on Ac- MS. Rep. Leeman v. Allen, Hil. 3 G. 3. in C. B.

count of the Exceſſiveneſs of the Damages it was refuſed; becauſe the Court did not upon all the Circumſtances of the Caſe, as reported by *Pratt* Ch. J. before whom the Cauſe was tried, think the Damages Exceſſive; and by *Pratt* Ch. J. There is no doubt but the Court may grant a new Trial on Account of the Exceſſiveneſs of the Damages in an Action founded upon a perſonal *Tort*; notwithſtanding there is not any certain Rule of computing Damages in ſuch an Action: But the Court ſhould be very cautious of granting a new Trial in ſuch an Action, and ought never to grant one unleſs the Damages are ſuch as do appear at the firſt Bluſh to be quite outrageous.

MS Rep. Huckle and Money, Mich. 4 G. 3. in C. B.

In an Action of Treſpaſs there was a Verdict for the Plaintiff with three hundred Pounds Damages. Upon a Motion for a new Trial on Account of the Exceſſiveneſs of the Damages it

it appearing from the Report of *Pratt* Ch. J. before whom the Cauſe was tried, that a general Warrant was granted by the Earl of *Halliſax* one of his Majeſty's principal Secretaries of State, directed to four Meſſengers for apprehending the Printers of Number Forty-five of a Paper called the *North Briton*; that it did not appear that any Information was laid before the Earl of *Halliſax* previouſly to the granting of the Warrrant; that Mr. *Carrington* one of the Meſſengers to whom the Warrant was directed, who had received a private Information that Mr. *Dryden Leech* was the Printer of that Paper, had directed the Defendant, another of the Meſſengers to whom the Warrant was directed to apprehend the Plaintiff one of *Leech*'s Journeymen; and that the Plaintiff was apprehended by the Defendant and kept in Cuſtody about ſix Hours, during which Time he was treated very civilly.

A new Trial was refuſed and by *Pratt* Ch. J. If the Damages which the Plaintiff did in fact ſuſtain ought only to have been conſidered by the Jury, Damages to the Amount of twenty Pounds would perhaps have been full enough: But if the falſe Impriſonment, for which this Action was brought, was under a general Warrant granted by one of his Majeſty's principal Secretaries of State, it was, in my Opinion, a proper Caſe for the Jury to aſſeſs exemplary Damages in: Becauſe the falſe Impriſonment was an Attack upon publick Liberty, as well as a Violation of *Magna Charta*. There was another Reaſon for the Jury to aſſeſs exemplary Damages; which was, that an Attempt was made at the Trial of the Cauſe to maintain the Legality of the Warrant. Wherever an Injury is done under the Colour of Authority, as if an Officer empowered

ed to preſs exceed the Authority given him by the Preſs Warrant; or if a Maſter of a Ship abuſe the Power by Law veſted in him over the Sailors under his command; or if as in the preſent Caſe a Perſon is arreſted upon a general Warrant, the Jury in aſſeſſing Damages are not confined to the Damages which have been actually ſuſtained; but ought to aſſeſs exemplary Damages. Upon the Whole Circumſtances of this Caſe I am of Opinion that the Damages are not exceſſive.

It would moreover be quite unprecedented, as well as of the moſt dangerous Conſequence, for the Court to grant a new Trial in an Action founded upon a perſonal *Tort* on Account of the Exceſſiveneſs of the Damages; unleſs the Damages are ſuch as do appear at the firſt Bluſh to be quite outrageous.

MS. Rep. Beardmore v. Carrington and three others, East. 4 G. 3. in C. B.

In an Action of Treſpaſs there was a Verdict for the Plaintiff with one thouſand Pounds Damages. Upon a Motion for a new Trial on Account of the Exceſſiveneſs of the Damages it appeared from the Report of *Pratt* Ch. J. before whom the Cauſe was tried, that the Defendants, who were Meſſengers acting under a Warrant of the Earl of *Halifax*, one of his Majeſty's principal Secretaries of State, entered the Houſe of the Plaintiff; that they demanded his File of Letters, which being delivered they examined the Letters thereon as far back as the Year 1752; that they demanded of him to open ſome Drawers, which being done, they took out the Books wherein an Account of his Buſineſs as an Attorney was kept and looked thereinto; that they carried him to the Houſe of one of the Defendants and confined him there ſix Days; that

that the Plaintiff being at the Time of his being carried from home concerned in divers Cauſes, and in other Buſineſs as an Attorney, he was obliged to employ another Attorney to manage his Buſineſs; that while the Plaintiff was under Confinement the Defendants refuſed to let a Client, who came to him, converſe privately with him, or to write down what he wanted to ſay; that while the Plaintiff was under Confinement the Defendants refuſed to let him write a Letter to a Friend; and that the Plaintiff, in Order to obtain his Liberty, was obliged to enter into Recognizance for his appearing in the Court of *King's Bench* on the firſt Day of the Term next enſuing, and for his being of good Behaviour.

A new Trial was refuſed, and by *Pratt* Ch. J. Only one Cauſe has been mentioned, in which a new Trial was granted in an Action found-

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ed upon a perſonal Tort on Account of the Exceſſiveneſs of the Damages; unleſs the Jury had been practiſed upon or had been guilty of Miſbehaviour. In the Caſe of *Wood* v. *Gunſtone Sty.* 466. in which a new Trial was granted in an Action upon the Caſe for Words on Account of the Exceſſiveneſs of the Damages, it is ſaid that the Jury had ſhewn a Partiality to the Plaintiff; and in another Caſe 1 *Lev.* 97. it is ſaid, that the Jury had in the Caſe of *Wood* v. *Gunſtone* been tampered with. In the Caſe of *Aſh* v. *Aſh. Comb.* 357. in which a new Trial was granted in an Action of Treſpaſs for a falſe Impriſonment on Account of the Exceſſiveneſs of the Damages, the Jury had miſbehaved in refuſing to anſwer the Judge, when he aſked their Reaſon for finding the Verdict as they did find it. In one Caſe, which is that of *Chambers* v. *Robinſon Str.* 691. a new Trial

Trial was indeed granted in an Action for a malicious Proſecution on Account of the Exceſſiveneſs of the Damages; and it does not appear that the Jury had been practiſed upon or had miſbehaved; for the only Reaſon aſſigned for the granting of it is, that the Defendant might try another Jury before he was finally charged with the Damages of One Thouſand Pounds. This Caſe is very ſhortly reported: And if there was no other Reaſon for the granting of the new Trial, we are of Opinion that the Caſe is not Law; becauſe this Reaſon, which would hold in every Caſe wherein the Defendant thinks the Damages are too great, appears to us to be a very ſtrange one for the granting a new Trial in any Caſe.

It has been inſiſted, that the Damages are in the preſent Caſe exceſſive; becauſe the Defendants, who are Servants to the Secretaries of State,

State, have only acted in Obedience to the Warrant of one of them; and that they are the more ſo; becauſe the Plaintiff has brought another Action againſt the Earl of *Halliſax* who granted the Warrant. As to this it is ſufficient to ſay, that at the Trial of the Cauſe the Jury were directed to aſſeſs Damages upon a Suppoſition that what was done under the Warrant could not be juſtified by any Plea whatſoever. If this Direction was right, which upon the preſent Motion it muſt be taken to have been, can the Court now ſay, that the Damages of One Thouſand Pounds are ſuch as do at the firſt Bluſh appear to be quite outrageous; in a Caſe wherein the Defendants have illegally entered the Houſe of the Plaintiff; pryed into all his Secrets; carried him from his Houſe and confined him ſix Days; and compelled him to enter into a Recognizance for his Appearance and good

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Behaviour. If the Court cannot now ſay this, a new Trial ought not to be granted; it being a ſettled Point, that a new Trial ought never to be granted in an Action founded upon a perſonal Tort; unleſs the Damages are ſuch as do at the firſt Bluſh appear to be quite outrageous.

In an Action of Treſpaſs there was a Verdict for the Plaintiff with Two Hundred Pounds Damages. Upon a Motion for a new Trial it appeared, from the Report of *Pratt* Ch. J. before whom the Cauſe was tried, that a Turtle, which was brought Home by the Maſter of a Ship for the Plaintiff, had by Miſtake been delivered to the Defendant; that upon the Plaintiff's going to demand the Turtle, the Defendant not only refuſed to deliver it or pay for it, but alſo ſhoved the Plaintiff out of his Houſe; that thereupon the Plaintiff intending to ſue the Defendant

MS. Rep. Grey v. Sir Alexander Grant, Trin. 4 G. 3 in C. B.

dant, who was a Member of Parliament, aſked him if he would wave his Privilege; that upon the Defendant's anſwering, that he would not in this Caſe wave his Privilege, the Plaintiff called him Scoundrel; and that thereupon the Defendant ſtruck the Plaintiff a Blow upon the Face, which occaſioned a black Eye. A new Trial was refuſed, and by *Pratt* Ch. J. as a Challenge and Death may be the Conſequence of a Blow given by one Gentleman to another. I think the Jury, who are in all Caſes the proper Judges of Damages, have done right in the preſent Caſe in giving exemplary Damages: And we are all of Opinion, that the Damages are by no Means exceſſive.

MS. Rep. Beardmore v. the Earl of Hallifax, Hil. 5 G. 3. in C. B.

In an Action of Treſpaſs there was a Verdict for the Plaintiff with Fifteen Hundred Pounds Damages. Upon a Motion for a new Trial on Account of the Exceſſiveneſs of the Damages,

Damages, it appeared from the Report of *Pratt* Ch. J. before whom the Cauſe was tried, that the Defendant had granted an illegal Warrant againſt the Plaintiff, in Conſequence of which the Houſe of the Plaintiff had been entered and his Papers looked into; and that he had been carried from his Houſe and confined ſix Days. The Ch. J. concluded his Report with ſaying, that he did not think the Damages exceſſive. A new Trial was refuſed, and by *Pratt* Ch. J. If in an Action founded upon a Tort there be any Rule by which the Court may meaſure the Damages, as in an Action of Treſpaſs for deſtroying a Field of Corn, a new Trial ought to be granted, if Damages to a much larger Amount than the Value of the Corn are aſſeſſed: But the Court ought never to grant a new Trial in an Action founded upon a perſonal Tort, unleſs the Damages are ſuch as do at the firſt Bluſh ap-

pear to be quite outrageous; becauſe the Damages, which do entirely depend upon the Circumſtances of the particular Caſe, muſt in every ſuch Action be ideal and ſpeculative, and the Jury are the Perſons, in whom the Power of aſcertaining Damages in all Caſes is by the Conſtitution veſted.

MS. Perkin v. Proctor and Green, Trin. 8 G. 3. C. B.

In an Action of Treſpaſs there was a Verdict for the Plaintiff with Forty Pounds Damages. Upon a Motion for a new Trial on Account of the Exceſſiveneſs of the Damages it appeared, from the Report of *Wilmot* Ch. J. before whom the Cauſe was tried, that *J. S.* being in the Poſſeſſion of a Public Houſe in *Red Lion Street* under a Leaſe, in Conſideration of the Sum of Forty Pounds aſſigned the Leaſe to the Plaintiff, who entered upon the Houſe; that the Defendants afterwards took out a Commiſſion of Bank-

Bankruptcy againſt *J. S.* which was founded upon an Act of Bankruptcy anterior to the Aſſignment, and being choſen Aſſignees of *J. S.* entered upon the Plaintiff and ouſted him; that thereupon the Plaintiff hired another Houſe in the ſame Street, directly oppoſite to this, in which he carried on the Buſineſs of a Publican; that this Houſe was immediately ſhut up, and that the Plaintiff did not loſe any Cuſtomer by being turned out of it; and that the Commiſſion of Bankruptcy being afterwards ſuperſeded the preſent Action was brought. A new Trial was refuſed, and by *Wilmot* Ch. J. As the Forty Pounds ſeemed to have been given for the Good Will of the Houſe, and it appeared that the Plaintiff did not loſe any Cuſtomer by being turned out, I ſhould have been very well ſatisfied if only Forty Shillings Damages had been aſſeſſed: But as the Jury, who are in all Caſes

the Conſtitutional Judges of Damages, and who in the preſent Caſe had all the Circumſtances under their Conſideration, have thought proper to aſſeſs Damages to the Amount of Forty Pounds; what they have done is by no Means ſuch an arbitrary or exceſſive Uſe of their Power of aſſeſſing Damages, as to make it proper for the Court to interpoſe by granting a new Trial.

CHAP.

CHAP. XXXIII.

Of awarding a new Writ of Enquiry on Account of the Exceſſiveneſs of the Damages.

UPON a Writ of Enquiry in an Action for a falſe Return of a *Reſcous* Fifty Pounds Damages were aſſeſſed. A new Writ of Enquiry was moved for on Account of the Exceſſiveneſs of the Damages: But it was refuſed; it appearing, that the Plaintiff had been arreſted upon a Writ of *Reſcous* founded upon the falſe Return, and had been confined in *Newgate* for ſome Time.

1 Barn. 153. Chiſvers v. Lambert and Weſtley, Mich. 8 G. 2.

2 Barn. 189. Yate v. Swaine, Mich. 15 G. 2.

Upon a Writ of Enquiry in an Action of Treſpaſs Two Hundred and Fifty Pounds Damages were aſſeſſed. Upon a Motion for a new Writ of Enquiry on Account of the Exceſſiveneſs of the Damages it was alledged, that the Plaintiff, who had been falſely impriſoned, had not been confined above twenty-ſix Days. The Court being of Opinion that the Damages were exceſſive, a new Writ of Enquiry was awarded upon the Payment of the Coſts; and a Rule was made that it ſhould be executed before a Judge at the next Aſſizes.

MS. Rep. Wilſon and Fell v. Blackmore and Money, Hil. 5 G. 3. in C. B.

Upon a Writ of Enquiry in an Action of Treſpaſs Six Hundred Pounds Damages were aſſeſſed. Upon a Motion for a new Writ of Enquiry on Account of the Exceſſiveneſs of the Damages it appeared, that the two Defendants entered the

the Shop of the Plaintiffs, who were Bookſellers and Partners; that upon their entering the Shop they informed the Plaintiffs, that they were Meſſengers, and that they had a Warrant granted by one of his Majeſty's principal Secretaries of State, to ſearch their Houſe for certain Numbers of a Paper called the *Monitor*; that in ſearching they took down ſome Books from the Shelves in the Shop and looked into ſome Boxes; and that upon not finding any of the Numbers they after continuing a ſhort Time in the Shop went away. A new Writ of Enquiry was refuſed; and by *Pratt* Ch. J. Although the Court has a greater Power over an Inquiſition found upon a Writ of Enquiry than over a Verdict, a new Writ of Enquiry ought not to be awarded on Account of the Exceſſiveneſs of the Damages in a Caſe like the preſent, wherein there is no Rule by

by which the Court can meaſure the Damages; unleſs the Damages are ſuch as do at the firſt Bluſh appear to be quite outrageous.

MS. Rep. Benſon v. Frederick, Hil. 6 G. 3. in K. B.

Upon a Writ of Enquiry, in an Action of Treſpaſs One Hundred and Fifty Pounds Damages were aſſeſſed. Upon a Motion for a new Writ of Enquiry on Account of the Exceſſiveneſs of Damages it appeared, that the Plaintiff, a Militia Man had been whipped by Order of the Defendant, his Colonel, without having been firſt tried by a Court Martial. A new Writ of Enquiry was refuſed; and *per cur.* A new Writ of Enquiry may be awarded in a Caſe wherein there is no Rule by which the Court can meaſure the Damages; but the preſent is by no Means a proper Caſe to award one in.

MS. Rep. Stringer v. Weſtber and another, Eaſt. 7. G. 3. in K. B.

Upon a Writ of Enquiry in an Action of Treſpaſs, One Hundred Pounds Damages were aſſeſſed. Upon

on a Motion for a new Writ of Enquiry on Account of the Exceſſiveneſs of the Damages, it appeared, that the Defendants who were Officers of the Revenue, had ſtopped the Waggon of the Plaintiff, who was the *Dover* Carrier, in Order to ſearch for ſmuggled Goods; that no ſmuggled Goods were found; that, although ſome Boxes were opened, no real Damage was done by the ſearching; and that the Delay occaſioned by the ſtopping of the Waggon was as ſhort as poſſible. A new Writ of Enquiry was awarded.

CHAP.

CHAP. XXXIV.

Of a Verdict by which greater Damages are assessed than the Plaintiff has alledged.

Bro. Dam. Pl. 21. Pl. 181.

IT is laid down, that the Jury, by whom the Issue joined in an Action of Trespass is tried, cannot assess Damages to a greater Amount than the Damages alledged by the Plaintiff.

Bro. Dam. Pl. 122.

But if in an Action of Trespass the Plaintiff charge the taking of Writings of the Value of Ten Pounds; yet if he alledge Damages to the Amount of Twenty Pounds, the Jury by whom the Issue is tried may assess Damages to the Amount of Twenty Pounds; for greater Damages may be

be ſuſtained by the loſs of Writings than the Value of the Writings.

In an Action of *Aſſumpſit*, wherein the Plaintiff alledged Damages to the Amount of only Ten Pounds, the Jury who tried the Iſſue found a Verdict for the Plaintiff with Thirteen Pounds Damages. The Judgment entered upon the Verdict was reverſed in an Action of Error; and *per cur.* It is always to be preſumed, that the Plaintiff knows better than any other Perſon what Damages he has ſuſtained. Yelv. 45. Percival v. Spencer.

In an Action of *Detinue*, wherein the Plaintiff alledged Damages to the Amount of only one Hundred Pounds, the Jury who tried the Iſſue found a Verdict for the Plaintiff with One Hundred and Fifty Pounds Damages. The Judgment entered upon the Verdict was reverſed in an Action of Error. Bulſtr. 49. Hoblin v. Kimble.

The

Bro. Dam. Pl. 68. 1 Rol. Abr 578. Pl. 3. The Jury by whom the Iſſue joined in an Action of *Detinue* is tried, may aſſeſs Damages againſt the Garniſhee to a greater Amount than the Damages alledged; becauſe as the original Defendant is diſcharged of the Action, the Garniſhee having by Interpleading taken the Defence thereof upon himſelf, the latter, beſides being liable to the Damages alledged, is moreover liable to Damages for the Delay occaſioned by his interpleading.

Yelv. 45. Percival v. Spencer. A Verdict, which is in itſelf bad on Account of Damages being aſſeſſed to a greater Amount than the Damages alledged may be made good by entering a *Remittitur*, before Judgment is entered up, as to ſuch Part of the Damages as does exceed the Damages alledged.

In

In an Action of *Replevin*, wherein the Defendant avowed the taking of the Goods for two third Parts of an Arrear of Rent, the Jury who tried the Iſſue found a Verdict for the Plaintiff with Damages to the Amount of the whole Arrear of Rent. It was holden, that the Defendant might, after entering a *Remittitur* as to the Damages, have Judgment for the Return of the Goods. Moor 278. Battey v. Trevillion.

In an Action of Debt upon an old Judgment, wherein Damages were alledged to the Amount of only Ten Pounds, the Jury who tried the Iſſue in computing Damages reckoned Intereſt of the Money due upon the Judgment, and found a Verdict for the Plaintiff with Thirty Pounds Damages. An Action of Error being brought upon the Judgment entered on the Verdict, the Court was moved in a Term ſubſe- Str. 1110. Wray v. Liſter.

quent to the entering of the Judgment, that the Plaintiff might enter a *Remittitur* as to ſo much of the Damages as exceeded Ten Pounds. It was holden, that ſuch a *Remittitur* could not be entered in a Term ſubſequent to that in which the Judgment was entered.

CHAP. XXXV.

Of Double and Treble Damages.

ONLY ſingle Damages are recoverable at the Common Law.

Some Caſes have been already mentioned, wherein double or treble Damages

Damages are given by particular Statutes.

It is by no Means neceſſary to repeat what has been mentioned; nor is it neceſſary to enumerate the Caſes wherein double or treble Damages may be recovered.

In an Action upon the Caſe for reſcuing Goods diſtrained for an Arrear of Rent, in Order to ſell them *Secundum Leges et Statuta Angliæ*, there was a Verdict for the Plaintiff with ſingle Damages. Upon a Motion that the treble Damages; which are given by the 2 *W.* and *M. Stat.* 1. *c.* 5. might be awarded, it was holden, that the Plaintiff was not intitled to treble Damages, becauſe he had neither alledged that the Reſcue was *contra Formam Statuti*, nor brought his Caſe within the Statute by ſhewing that the Goods were appraiſed. Lord Raym. 342. Anon.

The Jury, who try the Iſſue joined in an Action wherein treble Damages are recoverable, may aſſeſs the treble Damages. But if the Jury, who tried the Iſſue joined in an Action wherein treble Damages are recoverable, have omitted to aſſeſs the treble Damages, the Court may award the treble Damages, or a Writ of Enquiry may be awarded for the aſſeſſing of them.

Bro. Dam. Pl. 70. In an Action for a forcible Entry there was a Verdict for the Plaintiff with Twenty Pounds Damages. As treble Damages are in this Caſe given by the 8 *H.* 6. *c.* 9. it was awarded by the Court, that beſides the Damages of Twenty Pounds aſſeſſed by the Jury the Plaintiff ſhould recover Forty Pounds more.

MS. Rep. Bennet v. Hart, Eaſt. 28 G. 2. in K. B. In an Action of Treſpaſs againſt an Overſeer of the Poor, on Account of a Thing done by Virtue of the

43 *Eliz.*

43 *Eliz. c.* 2. there was a Verdict for the Defendant; but the Jury omitted to aſſeſs the treble Damages given by that Statute. A Writ of Enquiry was awarded; and by *Denniſon* J. If Judgment had been entered up the Application for a Writ of Enquiry would have been too late; but as it has not, the Court may award one. There muſt however be, as a Foundation for awarding the Writ of Enquiry, a Suggeſtion entered upon the *Poſtea*, that the Defendant was an Overſeer of the Poor, and that the Action was brought againſt him for a Thing done by Virtue of the 43 *Eliz. c.* 2.

CHAP.

CHAP. XXXVI.

Of divers Things.

2 Inſt. 289. IF one Coparcener bring an Action of Partition againſt another, no Damages are recoverable againſt the latter; notwithſtanding ſhe had before the Commencement of the Action refuſed to make Partition.

Bro. Dam. Pl. 177. If the Perſon in the Reverſion bring an Action of Waſte, and obtain Judgment to recover the Place waſted, but die before Execution is executed, his Heir ſhall have the Land; but the Damages ſhall go to his perſonal Repreſentative, an Intereſt therein being veſted by the Judgment.

The

The Plaintiff, who was a Chimney Sweeper's Boy, having found a Jewel, carried it to the Defendant's Shop, who was a Goldſmith, to know what it was worth; the Defendant's Apprentice, under the Pretence of weighing it, took the Stone out of the Socket, and telling the Defendant that it came to Three Halfpence, the Defendant offered that Money to the Boy. As the Boy refuſed to take it, and inſiſted on having the Jewel again, the Apprentice delivered him the Socket without the Jewel. At the Trial of an Action of Trover brought for the Jewel, ſome Jewellers were examined, in order to ſhew what a Jewel of the moſt valuable Kind which would fit the Socket was worth; and *Pratt* Ch. J. ſaid, that unleſs the Defendant would produce the Jewel, he would direct the Jury to preſume that it was of the moſt valuable Kind, and to give Damages

Str. 505. Armery v. Delamirie.

mages to the Amount of what a Jewel of the moſt valuable Kind which would fit the Socket was worth.

1 Barn. 306. Corrance v. Newſon and others

A Motion being made, that a Rule of *Niſi Prius*, for referring it to one of the Prothonotories to aſcertain Damages to the Action, might be made a Rule of Court, Nothing was taken by the Motion; the Court being of Opinion that the Motion was improper.

FINIS.

Ex. Gm. B.